No. 2396

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

COLUMBIA RIVER PACKERS ASSOCIATION (a corporation), Appellant,

vs.

H. S. McGOWAN, ERICK LINDSTROM and J. P. COYLE, Appellees.

Appeal from the United States District Court for the Western District of Washington, Southern Division.

HON. GEORGE DONWORTH, JUDGE.
HON. EDWARD E. CUSHMAN, JUDGE.

Motion and Notice to Dismiss Appeal and Briefs for Appellees on Motion to Dismiss and on the Merits.

WELSH & WELSH, South Bend, Wash.
DORR & HADLEY, Seattle, Wash.
Solicitors for Appellees.

G. C. FULTON, Astoria, Oregon,
Solicitor for Appellant.

MOTION TO DISMISS THE APPEAL.

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

COLUMBIA RIVER PACKERS ASSOCIATION (a corporation), Appellant, vs. H. S. McGOWAN, ERICK LINDSTROM and J. P. COYLE, Appellees.	No. 2396

Come now, H. S. McGowan, Erick Lindstrom and J. P. Coyle, appellees in the above entitled cause, by Welsh & Welsh and Dorr & Hadley, their solicitors, and move the Court to dismiss the appeal herein upon the following grounds:

1. Failure to include, as a party to this appeal, the surety on the injunction bonds, to-wit: The United States Fidelity and Guaranty Company, against which a joint judgment to the extent of its liability was entered, it being a necessary party to this appeal.

2. Absence of any showing in the record that a summons or notice was served or any attempt made to sever the interest of appellant from that of the surety, so that a separate appeal might be maintained.

WELSH & WELSH and
DORR & HADLEY,
Solicitors for Appellees.

NOTICE OF HEARING ON MOTION TO DISMISS THE APPEAL.

UNITED STATES CIRCUIT COURT OF APPEALS.

For the Ninth Circuit.

COLUMBIA RIVER PACKERS ASSOCIATION, a corporation, Appellant, vs. H. S. McGOWAN, ERICK LINDSTROM and J. P. COYLE, Appellees.	No. 2396.

To the Columbia River Packers Association, Appellant in the above entitled cause, and to G. C. Fulton, its solicitor:

You are hereby notified that the foregoing motion to dismiss the appeal in the above entitled cause will be called up for hearing before the Court at the time said appeal is to be heard, to-wit: at the United States Court room in Seattle, Washington, September 14, 1914, or as soon thereafter as counsel can be heard.

WELSH & WELSH and
DORR & HADLEY,
Solicitors for Appellees.

ARGUMENT ON MOTION TO DISMISS THE APPEAL.

It appears from the record in this case that The United States Fidelity and Guaranty Company became surety upon appellant's injunction bonds in this action, two of which were executed by order of the Court, first, a bond for $2,000.00, and second, an additional bond for $10,000.00, making the aggregate sum of $12,000.00 (Tr. 17 to 20). The temporary injunction and restraining order were dissolved by an interlocutory decree, and the cause was referred to a master to take testimony and compute the damages to appellees by reason of the issuance of the temporary injunction and restraining order as aforesaid. (Tr. pp. 173-178). Thereafter, in the final decree (Tr. 197-202), judgment was entered against said surety company for the aggregate sum of $12,000.00, said amount being divided equally between the three appellees, making $4,000.00 in favor of each. The Court found that the appellees were equally interested in the damages recovered, and also found that as the liability of the surety company was limited to the sum of $12,000.00, one-third of that amount, or $4,000.00, should be awarded in favor of each appellee. The aggregate judgment awarded in favor of each appellee is $7,361.00 and one-third of the costs, or $361.10 costs in favor of each. The judgment in favor of each appellee also reads as follows:

"shall also recover in this action from the United States Fidelity and Guaranty Company, surety as aforesaid, the sum of $4,000.00, which amount is included in the above sum awarded him against the complainant, it being especially hereby declared that the liability of said surety and of the complainant is co-equal to the extent of $4,000.00 and no more, but that the complainant, the Columbia River Packers Association is liable for the whole of said sum of $7,361.00 and costs as taxed." (Tr. pp. 200-202.)

It will be seen by the foregoing quotation from the decree that there is no segregation of liability as between appellant and the surety company, but their liability is expressly declared to be "co-equal" to the extent of $4,000.00 in each instance. It is manifest, therefore, that the surety company is affected by the appeal and should have been joined therein. No attempt whatever was made to do this. Neither the petition for appeal nor the order thereon (Tr. pp. 726-727), nor the citation for appeal (Tr. pp. 752-753), in any manner joins the surety company, but the appellant appeals alone and independently.

No showing is made in the record that a summons or notice was served by appellant upon the surety, or that appellant made any attempt to sever its interest from that of the surety so that a separate appeal might be maintained.

Points and Authorities.

First.

The Trial Court, upon dissolving the temporary injunction and restraining order, had jurisdiction to assess damages and to enter a judgment against the surety.

The case of *Russell vs. Farley,* 105 U. S. 433; 26 L. Ed. 1060, announces the rule that a chancery court, in the absence of any statutory regulation, has the general power, on dissolution of an injunction, to assess damages. This case has been widely cited and followed, and may be considered the leading case on this point.

In *Blossom vs. Railroad Company,* 1 Wallace 655, 17 L. Ed. 673, Mr. Justice Miller states the law establishing the status of a surety, to be as follows:

> "It, however, seems to be well settled, that after a decree adjudicating certain rights between the parties to a suit, other persons having no previous interest in the litigation may become connected with the case, in the course of the subsequent proceedings, in such a manner as to subject them to the jurisdiction of the court, and render them liable to its orders; and that they may in like manner acquire rights in regard to the subject matter of the litigation, which the court is bound to protect. Sureties, signing appeal bonds, stay bonds, delivery bonds, and receipters under writs of attachment, become *quasi* parties to the proceedings, and subject themselves to the jurisdiction

of the court, so that summary judgments may be rendered on their bonds or recognizances." (1 Wall. pp. 655-656.)

The Circuit Court of Appeals for the Ninth Circuit has followed the rule as announced by the United States Supreme Court.

In *Tyler Min. Co. vs. Last Chance Min. Co.,* 90 Fed. 15 (9th C. C. A.), this court affirmed the action of the trial court in dissolving an injunction and entering judgment for the damages thereunder against the sureties on the injunction bond. The case of *Russell vs. Farley,* previously referred to, is cited as an authority.

The case of *Empire State-Idaho Mining & Developing Co., vs. Hanley,* 136 Fed. 99 (9th C. C. A.), decided by this Court in 1905, affirmed the action of the trial court in entering a judgment against the surety on an appeal bond. The cases of *Tyler Min. Co. vs. Last Chance Min. Co. (supra)* and *Blossom vs. Railroad Company (supra),* were followed.

In other circuits the same rule has been established.

Cimotti Unhairing Co. vs. American Fur Refining Co., 158 Fed. 171 (C. C., N. J.), follows the Last Chance case *(supra)* and the court entered a judgment against the principal and sureties on the injunction bond for damages caused by the issuance of the injunction. This case was affirmed by the Circuit Court of Appeals for the Third Circuit, 168 Fed. 529.

Other authorities to sustain this proposition are:

Lea vs. Deakin, 13 Fed. 514 (C. C., Ill.)
Coosaw Min. Co. vs. Farmers Min. Co., 51 Fed. 107 (C. C., So. Car.)
West vs. East Coast Cedar Co., 113 Fed. 742 (4th C. C. A.)

SECOND.

The surety is a necessary party to this appeal.

THIRD.

The appeal is defective for failure to join the surety and should be dismissed.

The authorities to sustain the second and third points can be considered together.

Estis vs. Trabue, 128 U. S. 225, 32 L. Ed. 437, is a case directly in point. A writ of error to the United States District Court for the Northern District of Mississippi was brought to review a judgment of that court against Estis, Doan & Co., the original claimants, in an attachment suit. The judgment was entered against the claimants and their sureties on the attachment bond. The Supreme Court held that this made the sureties necessary parties to the writ of error, and as they were not included, the writ was dismissed. We quote from the opinion (pp. 229-230):

> "But there is another difficulty in the present case, which cannot be reached by an amendment in or by this court under § 1005. The judgment is distinctly one against 'the claimants, and C. F. Robinson and John W. Dillard, their sureties in their forthcoming bond,' joint-

ly, for a definite sum of money. There is nothing distributive in the judgment, so that it can be regarded as containing a separate judgment against the claimants and another separate judgment against the sureties, or as containing a judgment against the sureties payable and enforceable only on a failure to recover the amount from the claimants; and execution is awarded against all of the parties jointly. In such a case the sureties have the right to a writ of error. *Ex parte Sawyer,* 21 Wall. 235, 240.

"It is well settled that all the parties against whom a judgment of this kind is entered must join in a writ of error, if any one of them takes out such writ; or else there must be a proper summons and severance, in order to allow of the prosecution of the writ by any less than the whole number of the defendants against whom the judgment is entered. *Williams vs. Bank of the United States,* 11 Wheat. 414; *Owings vs. Kincannon,* 7 Pet. 399; *Heirs of Wilson vs. Life and Fire Ins. Co.,* 12 Pet. 140; *Todd vs. Daniel,* 16 Pet. 521; *Smyth vs. Strader,* 12 How. 327; *Davenport vs. Fletcher,* 16 How. 142; *Mussina vs. Cavozos,* 20 How. 280, 289; *Sheldon vs. Clifton,* 23 How. 481, 484; *Masterson vs. Herndon,* 10 Wall. 416; *Hampton vs. Rouse,* 13 Wall. 187; *Simpson vs. Greeley,* 20 Wall. 152; *Feibelman vs. Packard,* 108 U. S. 14.

"Where there is a substantial defect in a writ of error, which this court cannot amend,

it has no jurisdiction to try the case. *Heirs of Wilson vs. Life and Fire Ins. Co.,* 12 Pet. 140. It will then, of its own motion, dismiss the case, without awaiting the action of a party. *Hilton vs. Dickinson,* 108 U. S. 165, 168.

"For these reasons the writ of error is dismissed."

The above case has been widely cited and followed.

In *Dolan vs. Jennings,* 139 U. S. 385, 35 L. Ed. 217, an appeal was dismissed in which the representatives of a deceased joint defendant were not made parties, the court holding the defect to be jurisdictional.

In *Mason vs. United States,* 136 U. S. 581, 34 L. Ed. 545, a writ of error was taken to the Supreme Court of the United States from a judgment of the U. S. Circuit Court for the Northern District of Illinois against a postmaster and his sureties. The writ was sued out by two of the sureties without joining the principal and the other sureties, and the Supreme Court refused to allow any amendment and dismissed the writ.

The rule and the reasons therefor are clearly stated in *Masterson vs. Herndon,* 10 Wall. 416, 19 L. Ed. 953, as follows:

"It is the established doctrine of this court that in cases at law, where the judgment is joint, all the parties against whom it is rendered must join in the writ of error; and in chancery cases, all the parties against whom a

joint decree is rendered must join in the appeal, or they will be dismissed. There are two reasons for this:

1. That the successful party may be at liberty to proceed in the enforcement of his judgment or decree against the parties who do not desire to have it reviewed.

2. That the appellate tribunal shall not be required to decide a second or third time the same question on the same record." (pp. 416-417.)

To the same effect are:

Hardee vs. Wilson, 146 U. S. 179, 36 L. Ed. 933.

Inglehart vs. Stansbury, 151 U. S. 68, 38 L. Ed. 76.

Davis vs. Mercantile Trust Co., 152 U. S. 590, 38 L. Ed. 563.

Sipperly vs. Smith, 155 U. S. 86, 39 L. Ed. 79.

Beardsley vs. Ark. & Louisiana Railway, 158 U. S. 123, 39 L. Ed. 919.

The Circuit Courts of Appeal, in various circuits, have also announced the same rule:

Ayres vs. Polsdorfer (6th C. C. A.), 105 Fed. 737.

Hedges vs. Seibert Cylinder Oil Cup Co., (3rd C. C. A.) 50 Fed. 643.

Galveston H. & R. Ry. Co. vs. House, (5th C. C. A.) 102 Fed. 112.

Loveless vs. Ransom, (7th C. C. A.) 107 Fed. 626.

Johnson vs. Trust Co. of America, (8th C. C. A.) 104 Fed. 174.

Grand Island & W. C. R. Co. vs. Sweeny, (8th C. C. A.) 103 Fed. 342.

Humes vs. Third National Bank (5th C. C. A.) 54 Fed. 917.

In the last case, Humes and Harris, sureties on a supersedeas bond, sued out a writ of error to review a joint judgment entered against them and the principal defendant. The writ of error was dismissed for failure to join the principal defendant with the sureties in the writ of error.

"The cause coming on for hearing, the defendant in error filed a motion to dismiss the writ of error—

'Because the defendant E. C. Gordon, against whom there is a joint judgment with plaintiffs in error, has not joined in said writ of error, and no reason is shown in the record for his not doing so, nor does the record show that any request was made of him to join, or refusal on his part to do so.'

"We are of opinion that the motion to dismiss the writ of error is well taken. It is apparent on the face of the record that the judgment of the court below was a joint judgment against E. C. Gordon, C. C. Harris, and Milton Humes. It is immaterial that Gordon was principal and the others sureties. If a writ of error could bring that judgment to this court,—a question not free from doubt,—the

long-settled practice requires that all of the joint defendants should join in the writ, or that there should have been a summons and severance, or equivalent proceedings, to entitle the plaintiffs in error to proceed alone, and the successful party below proceed to enforce his judgment against the defendant who does not desire to have it reviewed and this court not be required to decide a second time the same question on the same record." (p. 919.)

The principle urged by appellees, in support of this motion, is not peculiar to the Federal Courts, but has been recognized in the State Courts as well. In *Carstens vs. Gustin,* 18 Wash. 90, it was held that the sureties on a claim and delivery bond against whom a judgment had been entered, were necessary parties to an appeal and that the failure to serve notice upon the sureties was fatal to the appeal, and it was therefore dismissed upon authority of *Estis vs. Trabue,* 128 U. S. 225, to which we have previously referred.

Respectfully submitted,

WELSH & WELSH and
DORR & HADLEY,
Solicitors for Appellees.

ON THE MERITS OF THE CASE.

If the court shall deny appellees' motion to dismiss the appeal herein, which motion is hereinbefore set out, together with the brief and argument thereon, then appellees submit the following statement and argument upon the merits of the case.

Statement of Case.

This is an appeal from a judgment of the United States District Court for the Western District of Washington, Southern Division. The final judgment appealed from was entered by the Honorable Edward E. Cushman, Judge, on the 22nd day of September, 1913, (Tr. 197-202). The action was commenced by the appellant in the year 1908, the amended complaint upon which the cause thereafter proceeded having been filed on the 11th day of August, 1908. The amended complaint and the filing record thereof will be found at pp. 4 to 17 of the Transcript.

The complaint first alleges the corporate existence of appellant under the laws of the State of Oregon, and that the necessary steps had been taken to authorize it to do business in the State of Washington. It may be remarked here that at the time the suit was brought, the site and waters in controversy, commonly known as Sand Island and contiguous waters, in the Columbia River, were supposed by all parties to be in the State of Washington. It is contended by plaintiff that subsequently, in November, 1908, by the decision of the Supreme Court

in the case of *State of Washington vs. State of Oregon,* 211 U. S. 127, and by opinion on *Petition for Rehearing,* 214 U. S. 205, Sand Island was held to be within the territorial limits of the State of Oregon. Reference is made to the above decision at this time in order to explain the frequent references made to the State of Washington in the pleadings and record.

After averring that the defendants are each citizens and residents of Pacific County, Washington, within the Western District of said State and in the jurisdiction of the court, the complaint proceeds to state that long prior to the institution of this suit, the United States of America was and still is the owner in fee of that certain tract of land situated in Pacific County, State of Washington, being an island in the Columbia River near the mouth thereof, generally known as Sand Island; together with all tide lands, water rights, privileges, and easements surrounding and adjacent thereto; that Sand Island was by proclamation of the President of the United States, duly issued and published on the 29th day of August, 1863, reserved from sale, for military purposes and for a military reservation, and that the same has ever since been held as such by the United States; that inasmuch as said island was not for the time being required for public use, the Secretary of War of the United States, by authority of an act of Congress, did on the first day of May, 1908, duly lease to the plaintiff in this action for the term of three years from

said date, that portion of Sand Island designated on the maps and plats of the Government survey as Sites 2 and 3. It is further alleged that said lease carried with it the tide lands, water rights, fishing rights and riparian rights adjacent to the sites above mentioned, and to the navigable channel of the Columbia River.

It is alleged that the plaintiff thereupon entered into possession of the leased premises, which are described as being above the line of low water mark on the south side of Sand Island, consisting of a sandy beach up to the line of high water, beyond and above which the island is alleged to be composed of sand, upon which practically no vegetation grows; that the bed of the river below low water mark is quite level with a hard sandy bottom and a gradual slope for a short distance into deep waters; that the premises are and at all times have been of great value for the right of fishery thereon, and the right to haul and land seines thereon and in front thereof, to operate seines from the shore into the waters, and to haul the same on to the shore for the purpose of catching salmon fish during the salmon fishing season of each year on the Columbia River; and that the premises were leased by the United States to the plaintiff for the sole purpose of being used and employed as a fishery, and for the sole purpose of operating seines for catching salmon fish from the shore in the waters of said river and landing the same on the shores.

The complaint further avers that under the laws

of the United States the said waters are required to be kept free from obstructions, and that by virtue of said laws and said lease the plaintiff is entitled to have said waters and the channel of said river free and unobstructed, and is entitled to the free and unobstructed ingress to and egress from said premises, and also to the exclusive right of operating seines for the purpose of catching salmon fish from said shores in the waters of said river and landing the same on said shores.

It is next alleged that on the 30th day of June, 1908, pursuant to the laws of the State of Washington, the plaintiff applied for and obtained from the Fish Commissioner of the State of Washington three licenses to operate three seines upon said Sites 2 and 3, said licenses being numbered respectively 2391, 2392 and 2393, and that thereupon the plaintiff became entitled to operate three seines within the waters of the Columbia River for the period of one year from said date; that on the second day of July, 1908, the plaintiff took upon said leased lands its three seines and seining outfit, having made preparation to employ said leased premises in the operation of said seines for the purpose of taking and catching salmon; that in order to operate seines in front of said Sites 2 and 3, it is necessary that the waters and channel of said river shall be free and unobstructed for the reason that it is necessary to lay each seine out into the waters of the river a distance of two or three hundred fathoms, each seine being about that long, and to per-

mit the same to drift with the tide and current, and then to haul the same in onto the shore; that plaintiff was proceeding to so operate its seines when the defendants wrongfully and without plaintiff's consent, placed in the channel of said navigable waters, directly in front of said sites 2 and 3, certain obstructions consisting of large stones to which were attached wire cables, chains and large timbers for a float or buoy; that the obstructions were seven in number and were placed in the waters of the river about fifty to one hundred feet from the shore and about two hundred or three hundred feet apart; that the stones and anchors or weights were so placed that plaintiff could not operate its seines in the waters of the river, and could not land its seines on the shores of the leased premises.

The plaintiff next avers that it thereupon removed all of the obstructions and was proceeding to operate its seines at said place when the defendants again, on the 4th day of July, 1908, placed six more of said obstructions in front of the leased premises in practically the same position as those removed; that the defendants threaten to continue to place other obstructions in said waters and to continue to use and employ the same and will do so unless restrained by the Court; that said obstructions were not so placed for the purpose of trade or commerce or for any particular use, but for the purpose of harassing and annoying plaintiff and preventing it from operating its seines, and interfering with the plaintiff's free ingress to and egress from said premises.

The complaint alleged the existence of an emergency calling for a preliminary injunction against defendants and upon plaintiff's application, and upon giving a bond, first in the sum of $2,000.00 and later by order of Court in the sum of $10,000.00, with the United States Fidelity and Guaranty Company as surety, a restraining order was issued and continued in force *pendente lite,* restraining the defendants from placing or maintaining the appliances aforesaid. (Tr. 20-22.)

The defendants answered the complaint and also interposed a cross-complaint, and for convenience and by stipulation, the answer and cross-complaint of the defendant H. S. McGowan only is set out in the Transcript, it being stipulated that in essential particulars the answers and cross-complaints of the other defendants are identical with that of the defendant, McGowan, and that they may be omitted from the Transcript. (See Stipulation, Tr. 124-126.) The answer and cross-complaint of the defendant, McGowan, is set out at pp. 23-93 of the Transcript. The answer contains certain admissions and denials of allegations in plaintiff's complaint, and particularly denies that the Secretary of War of the United States ever at any time leased to the plaintiff any fishing rights in the waters surrounding Sand Island, and avers that neither the Secretary of War nor the United States itself has any power or authority to lease to plaintiff or any other person, any fishing rights, or the right to fish for salmon in the waters of the Columbia River; denies that the Secretary of War leased said prem-

ises to plaintiff for the sole purpose of being used and employed as a fishery, or for the sole purpose of operating seines for catching salmon from the waters of the river and landing the same upon the shore; denies that plaintiff is entitled to the exclusive right of operating seines for the purpose of catching salmon in the waters of the river and landing the same upon the shore; denies that the defendants wrongfully or in violation of plaintiff's rights or of the laws of the United States or of any law, placed obstructions in the navigable waters of the Columbia River in front of plaintiff's leased premises; denies that defendants have in any manner prevented plaintiff from operating seines on sites numbered 2 and 3; denies that defendants have excluded the plaintiff or the public from operating gill nets, drift nets or seines in the waters of the river; except that defendants admit that on July 2nd, 1908, they were the owners of and engaged in the operation of set nets in said waters on the south side of Sand Island, which were operated for the purpose of catching salmon under licenses issued by the Fish Commissioner of the State of Washington, on the 15th of April, 1908; the set nets being situated below the line of ordinary low tide, and also below the line of extreme low tide, and between the line of extreme low tide and the channel of the river.

The answer admits and avers that under and in pursuance of said licenses the defendants did on or about the 16th day of June, 1908, cause the locations for said set nets and each of them to be made by securely anchoring a buoy upon each location, upon

each of which buoys they caused to be posted the number of the license under which such set net was operated; that at the same place where defendants were operating their said set nets under licenses as aforesaid, their predecessors in interest operated fishing appliances for the purpose of catching salmon, under licenses issued by the Fish Commissioner of the State of Washington each year for the fishing seasons of 1902 to 1907 inclusive; and the defendants were in like manner operating their set nets under their aforesaid licenses for the year 1908 at the time they were enjoined in this action, and were so operating long before the plaintiff commenced its fishing with drag seines at said place; that prior to the commencement of this action the defendants had expended large sums of money in acquiring the rights of fishing and operating said set nets, which rights were of much value to the defendants by reason of the salmon caught and to be caught in the set nets during the fishing seasons of the year 1908 and future years; that salmon fish in the Columbia River are of great value and ascend the river in large numbers and schools at certain periods during each year, and on the 16th day of June, 1908, and at all times thereafter, they were ascending said river in large quantities, and would so ascend the river in large quantities this and each future year; that on the 16th day of June, 1908, and at all times thereafter until enjoined by the Court, the defendants were operating their said set nets for the purpose of catching salmon for sale in the market, and they had derived and expected to

derive large profits from their set nets; that at the time of the commencement of this action, and ever since the 16th day of June, 1908, the defendants were operating their set nets in the only manner they could be operated, and they were in no way interfering with sites 2 and 3 on Sand Island, the operations being entirely below the low tide line in front of said sites; that the operation of the set nets in no manner interfered with the navigation of the river for the purposes of trade and commerce, or for any other purpose for which the navigation of the river is or can be used; the set nets being so constructed as not to extend to the channel of the river, and the water at the place of their location not exceeding six feet in depth at low tide; that each set net would catch many valuable salmon if the defendants be permitted to fish and operate them, amounting to many thousands of dollars in value, the exact amount being impossible now to determine.

Many other things are circumstantially admitted, denied and alleged in the answer and cross-complaint, and while the whole thereof is urged on this appeal yet we believe the foregoing outlines the more essential points set up by the defendants. The cross-complaint alleges the necessity of a restraining order against the plaintiff, and concludes with a prayer for an injunction enjoining the plaintiff from interfering with defendants' operation of their set nets, and also for damages and general equitable relief.

The plaintiff answered the defendants' cross-complaint and admitted that the defendants obtained set net licenses from the State of Washington, but denied that the licenses authorized the defendants to operate under the same in any particular waters, averring that they were roving licenses. The answer to the cross-complaint admitted and denied many things, and generally maintained the position set forth in the complaint. Said pleading is set out at pp. 97-120 of the Transcript and defendants' replication thereto is found at p. 121 of the Transcript.

Thereafter the plaintiff petitioned the Court for the dismissal of the action without prejudice, on the ground that subsequent to the bringing of the action, the Supreme Court of the United States had decided that Sand Island and the waters in controversy are in the State of Oregon. Reference to said decision is hereinbefore made. It was contended by the plaintiff before the Hon. George Donworth, the judge presiding, that the Circuit Court of the United States for the Western District of Washington was for the above stated reason without jurisdiction of the subject matter of the action. Jurisdiction was not challenged on any other ground. The Court denied the petition to dismiss, the opinion of Judge Donworth being set out at pp. 130-145 of the Transcript. A *nunc pro tunc* order denying the petition was afterward entered by the Hon. Edward E. Cushman, judge, and is set out at pp. 146-147 of the Transcript.

After the denial of the petition to dismiss the action, the plaintiff, by leave of Court, filed a Supplemental Bill of Complaint, in which it was alleged that after the filing of the original bill, the plaintiff discovered that it had erroneously alleged in the original bill that Sand Island is in the State of Washington, whereas it has since learned that the island is within the territorial limits of the State of Oregon. The supplemental bill further alleges that for many years prior to the institution of this suit, it had ever been contended by the citizens and officials of the State of Washington that Sand Island is within the boundaries of said State, and that such claim was practically admitted by the citizens of Oregon; that the Fish Commissioner of Washington at all times held that the island was within the boundaries of Washington, and the Master Fish Warden of Oregon at all times conceded that it was in the State of Washington, and recognized licenses issued by the Fish Commissioner of Washington for seines used and employed on Sand Island; and that plaintiff at all times believed that the island was in the State of Washington until the 16th day of November, 1908, when it was otherwise decided by the Supreme Court of the United States, as aforesaid. It was further alleged that the island is now and at all times has been in the County of Clatsop in the State of Oregon, and the plaintiff prayed that if the Court shall be of the opinion that it has jurisdiction in the premises and of this suit, then it asks for judgment as prayed

in the original bill, otherwise for judgment of dismissal. The supplemental bill of complaint is set out at pp. 149-155 of the Transcript. The defendants answered the supplemental bill of complaint putting in issue the allegation that Sand Island is in the State of Oregon, and averring by way of affirmative defense and cross-bill that on the 19th day of June, 1908, and before any of the fishing licenses had been issued to plaintiff under which it is attempting to claim the premises in controversy in this suit, and during the time that said boundary suit was pending between the States of Oregon and Washington in the Supreme Court of the United States, and before the decision of said Court in said boundary suit was rendered, the defendants did as a precautionary measure, and for the purpose of protecting their rights in and to those certain set net fishing locations claimed by them, duly apply to the Master Fish Warden of the State of Oregon, he being the proper and only official of that State having authority to issue fishing licenses for the State of Oregon, for the issuance to defendants of set net licenses for fishing within the waters of the Columbia River, within the State of Oregon; that the necessary fees were paid to said Fish Warden, said licenses were issued to the defendants, who have held the same at all times since said 19th day of June, 1908; that said licenses were in full force and effect at all times after said date for one year, and until long after the rendition of the decision of the Supreme Court in said boundary line suit.

It is further alleged that the defendants seasonably and annually renewed their set net licenses which were issued to them by the Fish Commissioner of Washington on the 15th day of April, 1908, as described in the original answer herein, and under which their said fishing locations were taken and held prior to the attempted occupation of the fishing grounds in controversy in this suit, by plaintiff; and that said renewal licenses for the current year are now in full force and effect. The defendant's answer and cross-bill to plaintiff's supplemental bill of complaint is set out at pp. 157-162 of the Transcript.

Thereafter under the issues made up as indicated above, testimony was taken, and after trial such proceedings were had that the Court filed its memorandum decision and later its interlocutory decree, the memorandum decision being set out at pp. 166-172, and the interlocutory decree at pp. 173-178 of the Transcript.

We refer the Court particularly to the whole of the memorandum decision, as it is concise and clear in its statements; but it may be stated here that the decision in effect held that the complainant's rights as lessee of Sand Island from the United States extended to the line of ordinary low water; that under the common right of fishery, in the absence of a statute, no one has an exclusive right to fish in any particular waters of the Columbia River; that the regulation of this common right as between individuals is a matter governed by the State statute;

that it is for the State to say by its statutes what methods of fishery may be employed, and how, when and where the different individuals may fish, subject to the paramount laws of the United States for the protection of navigation; that one who complies with the statute thereby obtains a legal right to fish in the location which the statutes authorize him to appropriate, it being a necessary consequence of the right to regulate that individuals who comply with the regulations obtain a present right to hold and occupy locations for fishing purposes. It was held that the statutes of both Oregon and Washington authorize various appliances for catching salmon, among others, set nets; that they authorize the issuance of set net licenses; the necessary effect of which is to permit the licensees to locate a set net in some definite location. It was held that the defendants complied with the statutes applicable to procuring set net licenses and locating appliances thereunder; that having the State license to maintain and operate set nets defendants had the right to choose their location so as to appropriate a certain portion of the common fishery; and if they chose a location where complainant intended to operate a drag seine, but for which location it had secured no right under the State law, it was complainant's misfortune; that under the statutes of both states, he who is first in time in securing a location is first in right, and the upland owner is given no advantage as to priority over others. The Court found that the defendants, in selecting their location, complied literally with

the Washington law and substantially with the Oregon law; and that these facts, especially when considered in connection with the concurrent jurisdiction of both states on the Columbia River, gave the defendants priority over complainant, who had not complied or attempted to comply with the laws of either state. It was further held that inasmuch as the restraining order issued in complainant's behalf in July, 1908, was still in force, it had prevented defendants from continuing their possession of the location ever since, and that it must be presumed that but for the restraining order, the defendants would have lawfully continued to the present date the possession and rights which they had secured at that time.

The interlocutory decree provided that plaintiff shall take nothing by this suit and that the temporary injunction and restraining order theretofore issued upon plaintiff's application should be dissolved and vacated; that the defendants and cross-complainants were at the time of the commencement of the action and ever since have been, and now are, and until the expiration of the current license year, will be entitled to the exclusive right to construct, maintain and operate the set nets and other appliances which they had constructed in the months of June and July, 1908, on the fishing grounds in question; that plaintiff did not have, at the time of the institution of this suit, and has not, at any time since, had any right to interfere with the defendants and cross-complainants in their occupation and

use of said set nets and appliances or with the locations therefor; that plaintiff's interference therewith was without license or authority; that at all times since the commencement of this suit the defendants have had and now have the right to reconstruct, maintain and operate for fishing purposes in said location set nets and appliances of the same kind and character and covering the same area as those which they constructed as aforesaid in the year 1908. An injunction was awarded to each of the defendants and cross-complainants and against the plaintiff until the end of the current license year, expiring March 31, 1912, under the statutes of the State of Oregon. It was also provided that each of the defendants and cross-complainants is entitled to personal judgment against the plaintiff and its surety on its injunction bond, to-wit: The United States Fidelity and Guaranty Company, for damages sustained because of having been deprived by plaintiff of the use of said set nets and appliances from the 7th day of July, 1908, the date upon which the temporary injunction was issued, until the date of this decree; not, however, exceeding the sum of $12,000.00 against said surety, its liability under its bond being limited to that amount.

The interlocutory decree further provided that for the purpose of determining the amount of damages to be assessed against the plaintiff, the cause should be referred to the Hon. M. A. Langhorne, a Commissioner of the Court, as Master *pro hac vice* to ascertain and report to the Court the amount of

damages suffered by the defendants and cross-complainants; and to that end said commissioner was authorized to consider the testimony theretofore taken in the cause, and also to take such other and further testimony bearing upon the question and amount of damages, as the parties or either of them should offer. The commissioner was also directed to report to the Court his findings and conclusions, together with any further testimony taken before him.

Thereafter further testimony bearing upon the subject of damages was submitted by both parties before the commissioner; and the latter, after considering the same, together with the testimony previously taken, filed his written report thereon, together with his findings of fact and conclusions of law. The Master's report is set out at pp. 179 to 183 of the Transcript.

The Master's report found the damages in the aggregate to be $22,360.00, and that the three defendants and cross-complainants are equally interested in the damages and should have judgment accordingly.

Thereafter the Hon. E. E. Cushman, the judge presiding, filed his memorandum decision on the report of the Master, the same being set out at pp. 190-196 of the Transcript. The Court confirmed the report of the Master in all particulars except that the aggregate damages were found to be $22,083.00, instead of $22,360.00 as found by the Master. Thereupon the Court entered its final decree

and judgment, establishing the aggregate damages at $22,083.00, and awarded one-third thereof to each defendant and cross-complainant, making the full judgment in favor of each defendant and cross-complainant the sum of $7,361.00, together with $361.10 for costs, the latter amount being one-third of the taxable costs expended by the defendants and cross-complainants. The amount of the judgment in favor of each defendant and cross-complainant was also limited to $4,000.00 as against the surety, the United States Fidelity and Guaranty Company. The final decree and judgment is set out at pp. 197-202 of the Transcript. From said decree and judgment this appeal is sought to be prosecuted by the plaintiff in the cause, the Columbia River Packers Association, The United States Fidelity and Guaranty Company not having been made a party to the appeal.

Description of a Set Net.

A set net, as commonly used for salmon fishing on the Columbia River, consists of an ordinary drift or gill net of varying length, and depth, according to circumstances such as depth of water, strength of currents where the net is used, and other local conditions. The meshes of the net are of appropriate size, say, 5½ to 11 inches, to "gill" the fish (catch them by the gills), as they strike in. The net is hung on a cork line which floats on or near the surface, and a parallel lead line which hangs near the bottom to hold the net in an upright position. The net is held across current by being at-

tached from each end to substantial buoys which float upon the surface of the water, and anchors heavy and strong enough to hold the ends in place near the bottom of the river. The fish are caught while running up stream or against the current in an eddy.

JURISDICTION.

Having effectively used the process and machinery of this Court for four years to keep appellees out of their fishing grounds and to appropriate unto itself their fish and the profits therefrom, appellant now insists that the Court was always without jurisdiction in the premises, and that its motion to dismiss the suit should have been granted, notwithstanding the cross bills and demands on behalf of defendants.

Of course, no offer is made to return the money so taken from appellees by appellant through its alleged unlawful action, or to place the parties in *statu quo*. On the contrary the effort to secure the dismissal at this time is for the very purpose of evading the Court's decree in awarding appellees some measure of compensation for the great wrongs they have suffered at the hands of the appellant.

Says Mr. Street, in his Federal Equity Practice, Vol. 1, pp. 235-6:

> "The objection to the venue is personal to the individual defendant. * * * For a still stronger reason the plaintiff himself cannot raise the objection when the suit takes such a turn that it becomes desirable for him to get

out. This rule has been applied in the case of a cross bill."

Citing:

Callahan vs. Hicks, 90 Fed. 539.

Yet, appellant uses twenty pages of its brief in an endeavor to convince this Court that it should now be allowed to go hence, immune; the real reason being that a substantial judgment was entered against it, but the alleged reason being that, subsequent to the filing of its suit and issue joined thereon, the United States Supreme Court adjudged Sand Island to be in Oregon instead of Washington. Its motion to dismiss thereafter made, being properly denied inasmuch as issues had been raised by the cross-bills, long thereafter appellant filed a supplemental bill praying again that:

> " * * * Your orator have such judgment and decree as prayed for in its original bill of complaint." (P. 155, Transcript.)

In other words, the suit was practically begun again on identically the same theory and the injunction thereby prolonged and continued. Appellant did not require the consent of the Court to dismiss the injunction at any time, and thereby stop the further accumulation of damages; but it had no right to invoke the Court's aid to dismiss our cross bills, either then or now.

How, then, can appellant seriously contend that appellees have forced it to stay in this suit against its will, when, instead of dismissing the injunction,

appellant filed a supplemental complaint asking for the continuance of the injunction?

> "It has already been stated that pure supplemental bills are but continuations of the original bill, and used as amendatory process to cure matters which render the original bill defective; but a bill in the nature of a supplemental bill is in effect an original bill, beginning, as it were, a new suit, which simply draws to itself the advantages of the proceedings under the original bill and to that extent is supplementary.
>
> * * * * * * * *
>
> "A bill in the nature of a supplemental bill must, however, follow the general purpose of the original bill and be in accord with the tenor of its allegations."
>
> Simpkins, A Federal Equity Suit, 2nd Ed. pp. 373-4.

Since appellant's supplemental bill in effect constituted a new suit, asking for the same relief, and since the law is that although a new suit in effect, a supplemental bill must accord with the original pleading in matters such as jurisdictional averment, appellant's status is as though it never had filed a motion to dismiss; and any alleged virtue which it claims by reason of such motion is nullified by appellant's own act.

For that matter, the supplemental complaint could not have changed the original status of the case as to jurisdiction.

"The remedy by supplemental bill or by original bill in the nature of a supplemental bill is an ancillary proceeding, being dependent on the prior, or principal, suit. Consequently, jurisdiction in such suits is dependent on the jurisdiction in the principal suit. For instance, a plaintiff in a supplemental bill is not disabled from pursuing that remedy by the fact that he has (through change in situation) or could have, an adequate remedy at law. * * * The proceeding is ancillary and jurisdiction is dependent on jurisdiction in the original suit."

2 Street, Federal Equity Practice, pp. 748-9.

Citing:

Ross vs. City of Ft. Wayne, (C. C. A.) 63 Fed. 466.

Henry vs. Travelers' Ins. Co., 45 Fed. 299, 302.

Even if the location of Sand Island were material to the jurisdiction of this suit (and it is not, at all, as will be shown later), appellant, having alleged it to be in Washington, is bound by the statement of facts as originally pleaded.

"In order to reach the bottom of the matter we may here be allowed to refer to the circumstance that the purpose of the bill is to set forth a statement of facts which, when proved, will entitle the plaintiff to relief. The statement of facts must be borne out by the proof. A bill in equity differs entirely from a declaration at law. The declaration needs to embody

only legal conclusions, and the plaintiff may ordinarily vary his allegations to make them conform to any probable state of facts he is likely to prove. He is not concluded by the recitals of his pleading in regard to points of fact. The basis of a judgment in a court of law is found primarily in the verdict of the jury. The basis of a decree in equity, on the other hand, or at least one of its bases, is found in the allegations of fact made in the bill. The plaintiff in equity is concluded by the statements of fact in the bill. As against him those facts are taken to be true."

Street, Vol. 1, Federal Equity Practice, p. 145.

Furthermore:

"Jurisdiction depends on the state of things at the beginning of the action, and subsequent events cannot oust it. The jurisdiction of a court of the United States once obtained over property by the bringing of the same within its custody continues until the purpose of the seizure is accomplished, and cannot be impaired or affected by any legislation of the state or by any proceedings subsequently commenced in a state court.

"If the claim to relief clearly within the federal jurisdiction is fairly made and is not fictitious or fraudulent, jurisdiction attaches although the ultimate decision may be against the right claimed."

1. Street, Fed. Equity Practice, pp. 178-9.

Citing:

Hardenbergh vs. Ray, 151 U. S. 112.
Salt Co. vs. Brigel (C. C. A.), 86 Fed. 818.
Dunn vs. Clarke, 8 Pet. 1.
Mollan vs. Torrance, 9 Wheat. 537.
Ex parte Kyle, 67 Fed. 306.
Ritchie vs. Burke, 109 Fed. 16, 19.
Rio Grande R. Co. vs. Gomila, 132 U. S. 478, 481.
Penn. Mut. Life Ins. Co. vs. Austin, 168 U. S. 685, 695.
Louisville Trust Co. vs. Stone, (C. C. A.) 107 Fed. 309.

This suit comes squarely within the above rule. Appellant claims that it honestly averred Sand Island to be in this District, and jurisdiction being established, on the *prima facie* showing made in the original bill, it will continue to the ultimate decision and satisfaction though Sand Island be, as a matter of fact, in Oregon.

Appellant says (p. 57 App. Brief):

> "* * * as we understand the law applicable to this case, the decision of the Supreme Court (of Oregon) in *Eagle Cliff Fishing Co. vs. McGowan,* is binding upon this court and is decisive of this case."

Turning to pp. 768-9 of 137 Pacific, we find the following declaration in the Eagle Cliff opinion about this very suit:

"But, however this may be, the authority of a court to hear and determine a cause depends upon the allegations of the initiatory pleading, and not upon the facts, and an error committed in determining the jurisdiction does not usually render the judgment void; but such misconception of the question is generally regarded as voidable only. Van Fleet, Col. At. § 60. As the bill filed in the federal court of the state of Washington averred that Sand Island was within that state, and as that tribunal has general jurisdiction of the subject-matter thus involved, it will be assumed, without deciding the question, that the relief there awarded was not void."

This principle, that jurisdiction depends upon the orginal allegation, and is not affected by subsequent change in the situation, or a subsequent discovery that the jurisdictional averment was based upon a mistake of fact, is quite familiar in cases where the citizenship of the parties changes, pending suit; or the amount finally determined by the Court to have been in controversy is less than required, when the complaint has alleged more.

Conolly vs. Taylor, 2 Pet. 556.
Clarke vs. Mathewson, 12 Pet. 164.
Mollan vs. Torrance, 9 Wheat. 537.
Scott vs. Donald, 165 U. S. 58, 101.
Hardin vs. Cass County, 42 Fed. 652.
Riggs vs. Clark, (C. C. A.) 71 Fed. 560.

Jones vs. McCormick, etc., (C. C. A.) 82 Fed. 295.

However, neither the past, present nor future actual location of Sand Island, nor its alleged location, is material to the jurisdiction of this suit. Furthermore, neither is the doctrine of concurrent jurisdiction, so elaborately assailed in appellant's brief, necessary to uphold the court's jurisdiction.

Appellant instituted this action in the Federal Court on the ground of diversity of citizenship, the bill setting out all the necessary jurisdictional averments for that purpose.

The bill alleges that appellant is a citizen of Oregon, duly incorporated under the laws thereof, and that appellees are citizens and residents of Washington. The amount in controversy is shown, by the rule in suits for injunction, to have exceeded by many thousands of dollars, the jurisdictional requirement of three thousand. On page 14 of the Transcript are averments in the bill of complaint that appellant had spent $15,000 in equipment for this fishery; was expending $200.00 a day to maintain the outfit; and $5,175.00 per annum for rental of these premises, the total value of which fishery is alleged to be threatened with destruction by appellees' set-nets—"irreparably damaged; that the damage will amount to many thousands of dollars," etc.

> "So where injunctions are sued out to prevent destruction or injury to property, the jurisdiction is ordinarily fixed by the value of the

property to be protected. But the allegations of damage, actual or exemplary, in such cases will sustain jurisdiction."

Simpkins, A Federal Equity Suit (2nd Ed.), p. 187. Citing Federal cases.

"Where the value of the right to be protected is much greater than the value of the property about which the dispute originated, the value of the right to be protected or the extent of the injury to be prevented fixes the jurisdiction without reference to the amount that may be recovered by law."

Idem p. 186. Citing numerous Federal cases.

To the same effect see:

1 Foster Federal Practice, Sec. 16 g.

Here we have the necessary jurisdictional averment as to amount under all three theories, to-wit: physical value of the property affected, the allegations of damage, and the value of the right claimed, the amount of its annual rental for which, appellant states as above.

There can be no question, therefore—and appellant, who made all the jurisdictional averments, is the last who should be heard to raise it—that this Court has, and always did have, jurisdiction over the parties to the suit.

This is all the jurisdiction necessary: The action was for an injunction, out of which has developed an accounting. Appellant gladly enough accepted the Court's jurisdiction—power—to maintain its

injunction for four years, but now contends, in effect, that the Court should stop there and not retain the case for the purpose of exacting a reckoning, because, forsooth, Sand Island was never in Washington, as everybody supposed, and so the injunction itself, which has enriched appellant, was wrongful and illegal.

Whether the Court had jurisdiction to issue the injunction or not (and it most certainly did have, as we shall point out), it has jurisdiction to render this accounting and award the damages found herein to belong to appellees.

Appellant will hardly contend that an accounting suit is other than transitory, and that the Court needs jurisdiction over nothing more than the parties.

Such it has always had. Now, having this jurisdiction—power—over the parties, why may it not use the same to the end that justice shall be done? Especially since the Court itself in the earlier stages of the suit, and through the suit, has been an innocent means to the end that calls for an accounting?

> "A Court of equity which has obtained jurisdiction of a controversy on any ground or for any purpose will retain such jurisdiction for the purpose of administering complete relief and doing entire justice with respect to the subject matter. This doctrine seems to rest on the same principles which permit a court of equity to take jurisdiction in the first instance,

because the remedy is incomplete, or to avoid a multiplicity of suits."

16 Cyc. pp. 106 and 107, and cases there cited.

"The rule may be stated as follows: When a court of equity has rightfully obtained jurisdiction, it will retain it for complete relief though it be purely legal, as:

"First. When jurisdiction is taken upon an alleged equity which ceases before the suit ends or is dissipated by the evidence on the trial of the cause, the court will administer the legal remedy. * * *

"Second. * * * the court will administer complete relief, though, as to some matters involved, adequate relief may have been afforded by an action at law. * * *

"Third. A court of equity will take cognizance of a controversy to prevent a multiplicity of suits, although the exercise of such jurisdiction calls for adjudication on purely legal grounds and to confer purely legal relief."

Simpkins, A Federal Equity Suit (2nd Ed.), pp. 27-29. Citing a long list of cases.

"There is a saying that courts of equity delight to do complete justice and not by halves. This maxim has grown out of the desire of the court completely to decide every matter involved in the litigation, so that there may be no roots of controversy left out of which other suits may spring."

1 Street on Federal Equity Practice, p. 238.

In view of the foregoing, the judgment of the lower court appealed from here, is as valid on jurisdictional grounds as if appellees themselves had brought an original action in all respects regular, and been awarded damages for destruction of their set-net fisheries by manual force instead of by a court's injunction.

For the purpose of this appeal, from an award of damages to appellees, neither the location of Sand Island nor yet the jurisdictional power of the Court to have issued the injunction, is in the slightest way material.

THIS COURT HAD JURISDICTION TO ISSUE THE INJUNCTION EVEN THOUGH SAND ISLAND WAS IN OREGON.

Another familiar maxim is that Equity acts *in personam* and not *in rem*.

> "The great importance of this maxim lies in the fact that it formerly (and to a great extent it is still so) determined the venue of equitable proceedings. * * * in chancery all proceedings were transitory and could be maintained wherever jurisdiction of the person was acquired. The applications of this maxim will best appear from a brief consideration of the more important equitable remedies with special reference to their venue. * * *
>
> "(e) Injunctions — another application of the maxim now under discussion is in the granting of injunctions to restrain the commission of acts outside the jurisdiction of the

Court. * * * Thus * * a party within the jurisdiction may be enjoined from injuring real property situated outside the state. The practice of equity in this regard is not in conflict with the federal constitution."

XI Am. & Eng. Ency. of Law 167, 173-4.

"Personal Jurisdiction and Foreign Subject-Matter. The general rule is that where a court (of equity) has jurisdiction of the person of defendant it may render any appropriate decree acting directly upon the person, although the subject-matter may be without the jurisdiction; and it may in such case compel the performance of a contract outside the jurisdiction."

16 Cyc. p. 119.

"Equity Acts *In Personam.* This maxim embodies the principle distinguishing the process and decrees of the court of chancery and originally limiting their sanctions. It was originally the pride of the chancellors and the terror of the law judges that chancery acted directly upon the person or, as the phrase went, upon his conscience. It dealt with property but indirectly, by compelling the parties to act with relation to it. As a modern author has pointed out, there is a special sense in which equity has always acted *in rem,* in that its decrees are specific, dealing through the parties with the particular subject-matter in controversy, and not frequently awarding a recovery

out of the general assets of the parties. Moreover, the power of equity has been extended so as to permit it in some cases to act strictly *in rem*. It is unsafe therefore to consider the maxim as excluding the power of equity to deal directly with the *res;* but it is nevertheless true that equity deals primarily with the person, and usually only through him with the *res,* and such is the meaning of the maxim. While the influence of this principle affects the entire exercise of the chancery jurisdiction, its most important modern application is perhaps in permitting a court having jurisdiction of the person of defendant to adjudicate with reference to a subject-matter beyond the reach of its process, and by personal decree to require action concerning it. A more special application is in sustaining the power of a court to order a foreclosure and sale of the entire mortgaged property, although a large portion thereof lies out of the court's territorial jurisdiction."

16 Cyc. p. 134.

"In the vast variety of equitable remedies, there are, of course, some which directly affect the person of the defendant, and require some *personal* act or omission on his part, and these are still enforced, and can only be enforced, *in personam.* In regard to all other classes, the statutes of our states have, as a general rule, either made them operative *per se* as a source of title, or as conferring an estate or

right, or have given the requisite power to certain officers to carry them into effect. This modern legislation has not, however, deprived a court of equity of its power to act *in personam* in cases where such an effect is necessary to maintain its settled jurisdiction; as, for example, where the parties being within its jurisdiction, the subject-matter of the controversy, whether real or personal property, is situated within the territory of another state or nation."

1 Pomeroy's Equity Jurisprudence, Sec. 136, pp. 154-5, citing cases.

"One of the marked characteristics which distinguish equity from the common law, is that, while the latter, as a general rule, acts against and exercises control over property alone; has but a very limited and merely incidental power, mostly borrowed from chancery, to enforce obedience to a personal command, its procedure being founded upon the theory that the parties to an action owe no obedience to the court; and is consequently restricted in its operation when the property which is the subject of a contention is beyond the reach of its process; equity acts directly against and exercises complete control over persons, and does not lose jurisdiction when the parties are subject to its process, because the property over which it thereby assumes control is beyond the territory under those laws whence its own power is derived."

1 Foster Federal Practice, p. 2.

Citing:

Massie vs. Watts, 6 Cranch. 148.
Muller vs. Dows, 94 U. S. 444.
Carpenter vs. Strange, 141 U. S. 87, 106.

"An injunction can be made operative beyond the territorial jurisdiction of the court. Thus, if the party enjoined is within the jurisdiction, he is bound to obey the injunction, though it relates to the doing of some act abroad, such as the conveyance of land or the institution of a suit in a foreign court. Since the injunction operates *in personam,* it is immaterial, in a case where personal control over the defendant is alone desired, whether the subject-matter of the suit lies within the jurisdiction or not."

3 Street, p. 1392.

Citing:

Cherokee Nation vs. Georgia, 5 Pet. 79.
Cole vs. Cunningham, 133 U. S. 116.

See also:

22 Cyc. p. 906.
Phelps vs. McDonald, 99 U. S. 298.

Appellant says (p. 40 App. Brief):

"That the pending case is of a local character, the decisions and authorities cited in the arguments heretofore made, clearly show."

Said authorities are:

M. & M. R. R. Co. vs. Ward, 2 Black 485, which held the abatement of a public nuisance

—a mandatory order for the removal of bridge piers—to be *in rem,* and hence local.

North Ind. R. R. Co. vs. Mich. Cent. R. R. Co., 15 How. 233, holding that where the subject-matter involved title to real estate and a charter from a state, the suit was local in character.

Ellenwood vs. Marietta, 158 U. S. 105, which is distinguished in *Stone vs. United States,* 167 U. S. 178, as follows (p. 182):

"1. It is contended in behalf of Stone that as the lands from which the trees were alleged to have been unlawfully cut are in Idaho, the action is local to that State, and the District Court of the United States for the District of Washington was without jurisdiction. *Ellenwood vs. Marietta Chair Co.,* 158 U. S. 105, is cited as an authority for this proposition. But that case proceeded upon the theory that the allegations of the petition, at the time it was tried, presented a single cause of action, in which the trespass upon the land was the principal thing, and the conversion of the property was incidental only, and, therefore, that the entire cause of action was local. In the present case the petition, it is true, avers that the United States was the owner of the lands from which the trees were cut, but the gravamen of the action was the conversion of the lumber and the railroad ties manufactured out of such trees, and a judgment was asked, not for the trespass,

but for the value of the personal property so converted by the defendant."

We repeat that the subject matter of this suit is not local but transitory, simply involving the court's jurisdiction over the parties for the purposes, first, of ordering appellees to refrain from constructing their set-nets as contemplated; and second, of exacting an accounting from appellant to appellees for the damage done. The court in this action does not need the power to extend its process to the locality and by its own officers remove a structure already standing, as would have been necessary in *M. & M. vs. Ward.* Nor is there any question of title to real estate in or charter from another state, calling for local adjudication, as in the North Indiana R. R. Co. case. Nor yet is there issue over trespass upon land, as in the Ellenwood case; the gravamen here being injury to a claimed incorporeal right, which is as we contend, transitory and can be litigated wherever the process of the court can reach the parties.

So, this being a transitory action—an equity suit purely *in personam* and in no way whatsoever dependent upon the situs of the subject-matter—this tribunal, with all parties to the suit regularly in court, has full jurisdiction to try and dispose of all the issues involved.

Appellant Does Not Distinguish Between Jurisdiction and Venue.

The sole theme of appellant's jurisdictional contention is that this suit should have been brought

in the Federal Court of Oregon instead of the Federal Court of Washington. The Court's "jurisdiction" is not attacked on any other ground. While jurisdiction—power—cannot be maintained by estoppel, venue—the forum—can be; and appellant having itself chosen the court, as it had the privilege of doing, will not now be heard to object to the decree because of the Court's alleged lack of power to enter it. Suppose the Court did lack the power to maintain the injunction: it does not lack the power to recall it and award these damages, the parties all being within its jurisdiction, or power.

What would become of the right of counterclaim, if a plaintiff, beaten in the final judgment, could repudiate the whole suit and get out from under, by claiming that he made a mistake of judgment and should have tried his luck in some other forum? A court of equity, especially, which "delights to do justice and not by halves," is hardly so constituted as to entertain appellant's peculiar request.

A defendant, even, who might have objected in the beginning, cannot raise the question of venue after having pleaded.

> "If a suit is of such nature that it can certainly be brought in some federal court or another, that is, if the subject-matter of the suit or the character of the parties is such that a federal court of some state or district has jurisdiction to entertain it, then the question whether that suit should be brought in one par-

ticular state or district rather than in another is not a question of jurisdiction at all. It is rather a question of venue, using this word in the sense of the civil division from which the jury must be gathered and in which the cause, if an equity one, should be tried. True, the term jurisdiction is frequently used in this connection and as a result some confusion has appeared in the cases. But the higher courts, and especially the supreme court, have constantly insisted on the distinction between the question of essential jurisdiction and the question of the mere place of bringing suit. As commonly put, the distinction is one between essential jurisdiction on the one hand and an exemption from process on the other."

1 Street on Fed. Equity Practice (228-9).

"The reader will note that the term venue has not been generally used in bringing out the distinction in question, but there seems to be no good reason why it should not be. In the sense in which we now use the word, it may be said that the question of venue and the question of jurisdiction are wholly different and distinct. The question of jurisdiction goes to the power of the federal court to entertain and determine the suit. The question of venue is concerned only with the matter of the particular district in which suit should be brought. The first is a question of power. The second is rather a question of practice. Jurisdiction can-

not be conferred by the consent of the parties and the want of it cannot be waived. The venue is a matter of personal privilege and can therefore be waived by the party concerned."

1 Street on Fed. Equity Practice (230).

"Similarly a plea or answer to the merits waives any objection that could be taken in respect to the district in which the suit is brought, and of course an objection to the venue cannot be raised after trial and judgment on the merits, either in the court where the trial took place or in the appellate court."

1 Street on Fed. Equity Practice (232).

"For a still stronger reason, the plaintiff cannot himself raise the objection when the suit takes such a turn that it becomes desirable for him to get out. This rule has been applied in the case of a cross bill."

1 Street on Fed. Equity Practice (236).

Concurrent Jurisdiction.

If there be any doubt as to the application of the doctrine of concurrent jurisdiction generally, as an original proposition, or as an academic question in this case, we respectfully refer to Judge Donworth's able and comprehensive opinion on the points raised by appellant, which contains a complete answer thereto. (Tr. pp. 166-172. 172 Fed. 991.)

We have not reviewed the authorities on concurrent jurisdiction, because we do not deem such jur-

isdiction necessary to sustain adjudication of the issues in this suit. However, we assert that such jurisdiction does attach, as Judge Donworth's opinion shows.

To summarize, jurisdiction attaches in this suit because:

1. The Court has jurisdiction over the parties and concurrent jurisdiction over the situs.

2. The Court has jurisdiction over the parties and jurisdiction over the situs because of the averments in the complaint.

3. The Court has jurisdiction over the parties for a prohibitory injunction, which acts only *in personam* and needs no jurisdiction over the subject-matter.

4. The Court has jurisdiction over the parties for a transitory action for damages.

5. As the Court has jurisdiction over the parties, complainant is estopped to question the validity of its decree because of the venue.

THE STATE BOUNDARY LINE.

When this suit was brought, and for many years prior thereto, there was no question in the minds of any of the people, both public officials and laymen, in Oregon and Washington, that the *locus in quo* was within the territorial limits of the State of Washington. The Oregon officials conceded the jurisdiction to Washington, and the Fish Commissioner of the latter State had habitually issued fish-

ing licenses for the territory. Such licenses were recognized by the Oregon officials.

The suit was predicated upon the theory that the premises were in Washington, and the answer was upon the same theory.

This situation is emphasized by the supplemental bill.

So far as the merits of this controversy are dependent thereon, it is not material whether the premises are within the boundaries of the one state or of the other. We do not, however, desire to waive our contention that the evidence in this suit clearly shows that, under the decision of the Supreme Court, in the Washington-Oregon boundary line case, the fishing locations in controversy in this suit are now situated within the territorial limits of the State of Washington.

The Supreme Court decision fixed this river boundary as:

> "* * * the center of the north channel, changed only as it may be from time to time through the processes of accretion."
>
> 211 U. S. p. 136.

We therefore have an indefinite, roving line, controlled by the daily fluctuations of the shifting sands of a mighty river.

The undisputed evidence in the case at bar shows that the so-called north channel no longer exists to the northward of Sand Island, but has entirely shifted its waters and course to the southward of Sand Island, the territory to the northward of

Sand Island having shoaled up by accretion to such an extent that at ordinary low tide a man can walk from Sand Island to the Washington shore proper. There is now absolutely no channel to the northward of Sand Island, and therefore, under the rule of the Supreme Court decision, it is proper to show that the state boundary has shifted by the process of accretion from the old north channel to the new channel southward of Sand Island.

Plaintiff opened up this question with its first and principal witness, Mr. Hawkins. We quote from the transcript, Vol. I, pp. 206-7, as follows:

> "* * * I am acquainted with Sand Island at the mouth of the Columbia River and have been acquainted with it for about thirty years. That there is and has been during that time only one island at or near the mouth of such river and it has always been called or named Sand Island, and I know of no other island in the river bearing such name. I could not tell its acreage. I should say at the present time it is about three miles long and about one and a half or two miles wide. It is considerably larger than it was when I first knew it. It has moved and the sand has washed up and accumulated on all sides and it has grown in length and width. I do not think the main body has moved since I became acquainted with it. I think it has just merely added on. The witness was then handed Plaintiff's Exhibit 'A,' hereunto attached, and he stated that the island

is much larger now than it was then, but that it is the same island that is involved in this suit; that the island has moved further north and is more extensive. That formerly the main channel of the Columbia River was north of such island, and when I first came here all of the ships came in on the north side of the island, and since that time the channel has changed to the south side. I am acquainted with Sites numbered 2 and 3 mentioned in Plaintiff's Exhibit 'E,' as indicated by the map attached thereto; that the map delineated thereon is the map of Sand Island, and that the Sites numbered 2 and 3 on such map are the seining grounds covered by the lease from the United States to the plaintiff. I have been acquainted with these sites since they have been laid out and for some time prior thereto."

Other witnesses explained the shoaling and shifting and disappearance of the old north channel in more or less detail, so that, as far as this case is concerned, there can be no reasonable doubt under the rule laid down by the Supreme Court that the center of the old "North Channel" is now to the southward of Sand Island. Sand Island, gradually making to the northward, has crossed and filled the channel and forced its waters to the southward.

See also:

Testimony of E. A. Coe (showing photographs), Transcript, pp. 231-234;

Testimony of J. F. Ford (showing photographs), Transcript, pp. 234-237;

Testimony of G. B. Hegardt (the Government Engineer), Transcript, pp. 237-253;

Testimony of H. S. McGowan (and photographs, especially Exhibits 16 and 17), Transcript, pp. 253-255, 270-273; and various charts and maps introduced as exhibits.

The Supreme Court recognized the great difficulty in arriving at a correct conclusion as to the true boundary line in this case; and in closing its opinion denying the petition for a rehearing, offered and suggested the following statement and procedure:

> "It must be borne in mind that an inquiry of this kind is attended with much difficulty. Here is a river of great width, three miles or so at certain places, whose bed is largely of sand, and whose channels have been naturally affected by the flow of the water, and also of late years by the jetties constructed by the Government in order to facilitate navigation. Congress, evidently recognizing the difficulty which attended the location of the exact boundaries, provided that the States of Washington and Oregon should have concurrent 'jurisdiction in civil and criminal cases upon the Columbia River.' Yet this provision does not determine the boundaries between the two States, and has proved insufficient to settle the disputes between them

as to things done upon the Columbia River. *Nielsen vs. Oregon,* 212 U. S. 315.

"We may be pardoned if, in closing this opinion, we refer to the following:

'Joint Resolution to enable the States of Mississippi and Arkansas to agree upon a boundary line and to determine the jurisdiction of crimes committed on the Mississippi River and adjacent territory.

'Resolved by the Senate and House of Representatives of the United States of America in Congress assembled: That the consent of the Congress of the United States is hereby given to the States of Mississippi and Arkansas to enter into such agreement or compact as they may deem desirable or necessary, not in conflict with the Constitution of the United States, or any law thereof, to fix the boundary line between said States, where the Mississippi River now, or formerly, formed the said boundary line and to cede respectively each to the other such tracts or parcels of the territory of each State as may have become separated from the main body thereof by changes in the course or channel of the Mississippi River and also to adjudge and settle the jurisdiction to be exercised by said States, respectively, over offenses arising out of the violation of the laws of said States upon the waters of the Mississippi River.

'Approved January 26, 1909.'

> "Similar ones have passed Congress in reference to the boundaries between Mississippi and Louisiana and Tennessee and Arkansas. We submit to the States of Washington and Oregon whether it will not be wise for them to pursue the same course, and with the consent of Congress, through the aid of commissioners, adjust, as far as possible, the present appropriate boundaries between the two States and their respective jurisdiction."
>
> *Washington vs. Oregon,* 214 U. S. pp. 217-218.

Thus it is clear from this latest expression of the Supreme Court in the boundary line case itself, that the two States should agree and settle between themselves the jurisdiction to be exercised by the respective States. This is just what had long been done by common consent and practice prior to the bringing of this suit and until after the injunction was issued. Appellant's supplemental complaint states positively that Oregon recognized Washington's jurisdiction and that Washington assumed it. (Tr., p. 154.)

RIPARIAN RIGHTS.

Appellant's brief has much to say about the riparian rights of shore-owners. What are "riparian rights"? Farnham on Waters—said by appellant to be "the latest work on this subject"—defines and discusses riparian rights in Vol. 1, Sec. 62, where we find the term to cover: (1) The shore-owner's

"right to have the water remain in place, and to retain, as nearly as possible, its natural character," preventing obstruction or pollution of the waterway; (2) Shore-owner's right "to have his contact with the water remain intact, * * * known as the right of access, and includes the right to erect wharves to reach the navigable portion of the stream, * * * subject to several limitations, however"; (3) The "right to preference in case the land under water is sold, * * * accretion, * * * and the preferential right to fill out into the waters if such filling is permitted by the public"; (4) "Use of the shore immediately adjacent to the land belonging to the public," i. e. the use of the tide-lands (between high and low water) while the tide-lands are still public property, which gives "the preferential right to secure ferry franchises and the right to draw nets onto his shore"—across said tide-lands; also (5) "Free use of the water space immediately adjoining his property for the transaction of such business as may be necessary in connection with wharves or structures erected by him," for example, preventing vessels from anchoring "in such a way as unreasonably to interfere" with his "wharves or docks," or "destroy his access to the water."

None of appellant's authorities on riparian rights holds that the shore-owner, as such, has a right to keep the space beyond his low-water mark clear from all obstructions, or indeed from any obstruction unless the same be shown to interfere with the free use of his wharf, the erection of which is a

special easement across the public waters to the line of navigation; or unless the obstruction unreasonably interferes with his access to the water.

The only right of a riparian owner, as such, beyond low-water mark, is access to his wharf if he has built one, or access to the edge of the water itself if he has not built a wharf. Any private right beyond low-water mark is contingent upon his having built a structure below such line. If not, his right of access is confined to the edge of, and not through, the body of the stream.

Once beyond the low-water line, his right of ingress and egress is not that of access at all ("access" to the water being the peculiar right of the riparian owner), but is his common right with the public at large, to enjoy free navigation.

The riparian owner's right of access is the same as an adjoining owner's right of access to any highway. Once on the road, his right is public, and not such as flows from the mere fact that his property abuts the same. A stranger has all the privileges in the road itself that an adjoining property owner has.

Moreover, if the stranger be licensed to erect a structure in the street which does not obstruct the land-owner's access to the street, such stranger cannot be enjoined from maintaining a private nuisance. The abutting owner's property right as such does not extend into the street, so he cannot enjoin a structure on that theory.

Here, the river below low-water mark is the high-

way. Appellant's shore ownership gives access to this highway but not rights on the highway. Rights on the highway are public, which are not concerned with one's private right of access to the highway.

Appellant cites many cases to show that access to the water is a riparian right. But that is not denied. What is denied is appellant's contention that "right of access" means more than it says, to-wit: Right of approach or admittance, merely. (See Webster's New International Dictionary.)

Because it leased these shore-lands to drag-seine the river in front of them, appellant claims that this proposed use of the water cannot be interfered with, its "riparian ownership" giving it such a property right in the river as to exclude all whose mode of operation might conflict therewith. Had the shore-land been bought or leased for a summer-resort, intending the view from the hotel to be unobstructed and the fairness of the landscape unmarred by piling or apparatus, has the shore-owning hotel-proprietor such private right in that deep water as to enjoin a fish-trap or set-net, licensed by the state, because the fish-trap or set-net interferes with the inn-keeper's private use for the public marine highway?

Is there a distinction? The point is: Appellant claims that "riparian ownership" carries with it such private property rights out in the public highway as to enable one to stop another from a licensed vocation in said highway, because the shore-owner wants to keep it clear for his own private purpose.

Appellant's authorities do not say that "right of

access'' itself extends below the low-water line. Had appellant built a wharf, it is conceded that a passageway from the channel to such wharf would have to be maintained as an incident to his special easement. But in the absence of this contingency, riparian (i. e., peculiar or private) rights stop at the low-water mark.

Appellant's injunction is predicated upon the theory that appellees' structures are a trespass upon its private property rights. Private property rights do not exist below low-water mark, except in the one case of an easement for a wharf. But even then, the easement does not embrace a right to keep a stretch of seven thousand feet absolutely unobstructed, as appellant here has done, even without such easement.

Exclusive Fishery.

Realizing the untenability of its claim in the lower court that its shore-ownership gives appellant an exclusive right of fishery in the river, counsel tries to drop that broad contention in his appeal brief and now avers that he never did make it; yet with the same breath re-iterates it time and again. Let us see how.

Two physical things cannot exist in the same space at the same time. If one is to have continuous occupancy, the other must give way entirely. If two modes of fishing so conflict as to stop each other, the question arises as to which of the two shall prevail; in other words, which shall exclude the other; for exclusion is the inevitable result. No amount of spe-

cious reasoning about other modes of fishing not under discussion here, can alter this fact. Why not as well argue that the fishery is not exclusive because appellees could have built a fleet of aeroplanes to hover over the water and catch salmon by hook and line or by nets dropped from above?

Between two irreconcilable modes of fishing one must be exclusive as to the other. Appellant's drag-seines exclude appellees' set-nets, or *vice-versa.* Appellant recognized this fact and acted upon it by tearing out appellees' apparatus three times, then by injunction appropriating the site and excluding appellees therefrom; in short, set up an exclusive fishery, which by its bill of complaint it asserted its right to do. (Transcript pp. 4-16.)

We do not aver that an exclusive fishery for a limited period is not possible; on the contrary, we assert that it is the commonest sort of salmon fishery in these states. Indeed, the appellees themselves are the ones entitled to an exclusive fishery here, since appellant's apparatus (drag-seines) by nature cannot be operated where set-nets are located. If appellant used drift-nets, for example, appellees' set-net locations would not necessarily be exclusive. As between the parties to this suit the fishery maintained by appellant was exclusive in it.

How then is an exclusive fishery created? By license from the state to fish by a certain method at a certain location. True, the shore owner, or anyone else, has a common right to drag seines in front of a given locality—the owner having this single advan-

tage over the stranger, that he can step from the water onto his own beach. But after the state has licensed a fixed appliance in front of that spot, any seining must be subordinate to the right of the licensed appliance to remain in place. And if such seining cannot continue without removal of the licensed fixture, the seine must give way. Any other rule would deny to the state the power to regulate its own fisheries.

Under appellant's contention, no fish-trap or set-net could exist in either Washington or Oregon, because the shore-owner could always claim the right to use the water for seining and that his special property in that water gave him the privilege of enjoining anything which interfered with that intent. And so licensed citizenship must give way to unlicensed force and violence of shoreland ownership, as was manifest when appellant invaded appellees' licensed fishery and destroyed the moorings on same three times. The plenary power of the state to manage its own fisheries as has been taught to its residents and citizens by a century of American jurisprudence, becomes lost in the revised chapter on "riparian rights" by opposing counsel.

The Eagle Cliff Case.

Contending that the case of *Eagle Cliff Fishing Company vs. McGowan* is binding upon this Court, counsel for appellant, after discussion of the points there involved (omitting, incidentally, to note its distinguishing feature from the case at bar); quotes

from the opinion of Judge Moore, and draws this conclusion (pp. 59-60, Appellant's Brief):

> "The Supreme Court of the State of Oregon held that the licensee (lessee?) of the United States to Sites 1, 2 and 3, on Sand Island, was entitled of right to the free and unobstructed ingress to and egress from such shore to the navigable channel of the river, for the purpose of hauling and landing seines from the water, and for the purpose of launching the same from the shores into the water, and that under the laws of the State of Oregon, one armed with a license to operate a set net or fixed appliance was not authorized to erect or maintain one in front of such tide-land owner."

As we read the record in that case, the point at issue must have been whether the set-nets there in controversy were constructed according to law; not, as here, whether they may be constructed at all.

Appellant says (p. 59, App. Brief):

> "The Eagle Cliff Fishing Co. claimed that it was the owner of the shore and tidelands, and as such owner, as an incident thereto that the private right of access to every part of the water bordering thereon the navigable channel of the river, and that this was property right and could not be taken from it without due process of law. This is precisely the claim made by the appellant in this suit."

Yet, on this point, the opinion says (p. 61, App. Brief):

"Though the right of fishing in a navigable stream in Oregon is free and common to all the citizens of the state, the tideland owner on such a stream has the exclusive right to draw a seine on his own land. *Hume vs. Rogue River Packing Co.,* 51 Or. 237, 244, 83 Pac. 391, 92 Pac. 1065, 96 Pac. 865, 31 L. R. A. (N. S.) 396, 131 Am. St. Rep. 732. While in the case at bar the sole privilege thus adverted to is held by the plaintiff in consequence of its possession of the demised premises, which right is undoubtedly of great advantage in landing salmon entrapped by a seine, such lawful occupant of the sites mentioned is not entitled to, and cannot exercise at such place, any prerogative in the manner of catching such fish differing from that which can be legally asserted by every other citizen of the state. *Hume vs. Rogue River Packing Co., supra.*"

In other words, the Oregon Supreme Court declares that the shore-owner's special privilege is (as we have before pointed out) confined to the shore itself, his right to fish beyond the shore differing not "from that which can be legally asserted by every other citizen of the state."

Appellant informs us that this means "as such (tideland) owner, as an incident thereto" appellant had "the private right of access to every part of the water," that privilege giving, in Oregon (p. 65, App. Brief), "the right to enjoin the placing of set nets

in front of his shore and the line of navigability of the navigable waters fronting thereon."

Hume vs. Rogue River Packing Company, 92 Pac. 1065, cited by Judge Moore as a statement of the law in Oregon, holds (p. 1068):

> "By the law of this state, as declared and established by this Court, the owner of upland bordering on navigable water has no title in the adjoining lands below high-water mark, nor any rights in or over the adjoining waters as appurtenant thereto. *Hinman vs. Warren, supra; Parker vs. Taylor,* 7 Or. 435; *Parker vs. Rogers,* 8 Or. 183; *Shively vs. Parker,* 9 Or. 500; *McCann vs. Oregon Railway Co.,* 13 Or. 455, 11 Pac. 236; *Bowlby vs. Shively, supra.*"

If the Eagle Cliff decision follows this settled law of Oregon (and it professes so to do, in the extract quoted above), then there can be but one possible ground upon which the court based its decision, to-wit: That the facts were such as to sustain the injunction as a matter of public policy, and not private trespass, as appellant would have us believe.

Nor do we see anything inconsistent with this in the opinion, for the Court states positively that plaintiff has no private rights beyond the shore-line as an incident to its riparian ownership; and, on the other hand, reaches its decision in these words (p. 64, App. Brief):

> "It is believed that the obstructions placed by the defendants in the Columbia River were not authorized by statute, and that they tended

to create an exclusive right of fishing, the continuance of which was properly enjoined."

No fishing statute affecting a shore-land owner is involved, one very good reason being that there is none in Oregon applying to shores of the Columbia River. Though plaintiff there, like the appellant here, urged its common-law riparian rights as a basis for its injunction, the Court allowed it upon statutory grounds instead; so that, as affecting appellant's contention here that it has a common-law private property right in the river, the Eagle Cliff decision is not in point.

The Court cites Oregon statutes authorizing and licensing set-nets, and does not question their validity. There is no suggestion even that these laws are void, as they must inevitably be if the shore owner can, to suit his personal whim, set them aside.

The opinion itself therefore expressly recognizes that the shore owner, as such, has no private or property rights in the water, and that set-nets as such are quite legal. What is left, then, on which to base the decision but the belief that the appliances were themselves so constructed as to be an unlawful interference with the rights of fishery? Appellant says the facts are identical; but not if we are to take the averments in the Eagle Cliff bill of complaint as a statement of the facts in that controversy.

In the case at bar, the record shows that appellees' buoys were one hundred feet or so from shore and several hundred feet apart (Tr., 228, 349), leav-

ing between each location a clear space of at least four or five hundred feet in front of the shore, and, beyond the outer buoy of each set, the entire river, unobstructed. This was ample room for the navigation of the largest ocean vessels in to appellant's shore—had such use been contemplated—and for every other reasonable purpose, including drift net fisheries. The only use of the waters to which appellees' set-nets might be considered an obstruction would be such use as requires that no obstruction whatsoever be imposed, even a pile or an anchored vessel. The "right of access" never contemplated such a monopolistic interest in a shore-owner.

The complaint in the Eagle Cliff case sets forth, with particularity, the construction of the set-nets, alleging Paragraph VII, (Abstract of Record, *Eagle Cliff Fishing Co. vs. McGowan,* p. 13):

> "That said obstructions are about twenty in number and are placed in the waters of said river about twenty-five to fifty feet from the shore and about from one to two hundred feet apart and strung along the entire shore of said sites 1, 2 and 3, and the said defendants also have laid and anchored a cable in front of site numbered ...., running along the entire front thereof and have anchored the same with two large anchors in the bed of said river close to the ordinary low water line. That said stones and anchors aforesaid were large and of great weight and are so placed that plaintiff cannot possibly operate its seines in the waters of said

river and cannot land its seines, or either thereof, on the shores of said sites 1, 2 and 3, and wholly prevent the plaintiff from operating seines on said lands and exclude the public generally from operating gill nets, drift nets and seines in the waters of said river."

The Supreme Court seems to have considered such to be the case, for it holds "the obstructions" to be of a kind unauthorized by statute—not set-nets as a class but these particular structures; the statutes that authorize set-nets not contemplating a cable stretched along the entire front of appellant's site twenty-five feet from shore, preventing access to the water and so built as to exclude the public generally from the operation of "gill-nets, drift-nets and seines." Such construction, the Court says, "tended to create an exclusive right of fishery [excluding every other kind], the continuance of which was properly enjoined."

Moreover, it is not unreasonable to suppose that a cable stretched along the entire shore line and but twenty-five feet out from it, cuts off one's riparian right of access, as a fence or rope extended in front of one's lot and but a foot or two away might be deemed an obstruction of access to the street. But right of access to the street or the water does not carry with it a property right in the street or the water. The street belongs to the municipality and the water and its contents to the State, as the owner of the bed under the water.

As it nowhere appears in the case at bar, that

there was any obstruction within a hundred feet from shore, or at all between the shore and the opposite side of the river, except by intermittent buoys several hundred feet apart, it cannot be said that appellant's access to the water, or for that matter clear across the water, is unreasonably interfered with, as the Court found it to be in the Eagle Cliff case.

Appellant insists that right of access means right to keep the river absolutely clear for its particular private purpose; but the authorities, especially in Oregon, do not support such a contention, nor is there any statute to that effect.

Counsel takes the firm stand that right to drag seines across the shorelands carries with it right to go out and fill up the seines also. We submit that this is an unwarranted assumption. The right to manipulate the seines on the public water is purely a public franchise subject to the will of the State, and in no way whatever related to the right of walking and dragging on the dry land. This distinction could not be more clearly stated than Judge Moore himself has stated it in the extract above quoted. Appellant itself admits that appellees could drag-seine the river as a public right if they landed the fish on a boat instead of trespassing upon the shore land.

Furthermore, appellant at the time this suit was begun had no Oregon licenses to operate a drag-seine or any other fishing appliance on this site, nor to operate this particular drag-seine upon any site.

If, as counsel insists, the Oregon fish laws govern, then appellant was itself guilty of unlawful fishing there. The Oregon statutes require licenses for drag-seining, whatever riparian rights a shore-owner may or may not have; and provide for seizure and confiscation of seines thus unlawfully used. B. & C. Code, Secs. 4060, 4089, 4090, 4093, 4111.

Is this Court to accept the astounding doctrine here asserted that a shore-owner, because he owns the land touching upon the water, can ignore all the fish laws of the State and set up an exclusive fishery as a property right—disregarding all regulations and penalties—and further yet can dictate that the State shall not authorize anything under its own laws which interferes with his purposes?

This doctrine stated conversely would be: No sort of stationary gear can be authorized by the State, even though a license has been issued therefor. Only gill nets and seines may be used; except by and with the advice and consent of the shore-owner, who is required to take no license of any kind to operate such fishery as he may choose.

Why bother about licenses at all, when by owning a strip of shore-land, one may dictate to the State itself what disposition to make of its fisheries? Logically it must follow that the shore ownership carries with it the exclusive right of fishery as a property right and the fishery statutes are mere baits to catch gudgeons. What right has Oregon to collect annually licenses for hundreds of set-nets and traps if shore-owners may prohibit their operations?

It is manifest that counsel expends these efforts to induce this Court to accept such a doctrine, in order to cover up the fact that appellant had no legal right by way of franchise to maintain this fishery. Having ignored all the fish laws of the State, counsel would make this Court believe that it had a "property" right superior to that of the owner of the fishery itself, the sovereign State.

If, therefore, the Eagle Cliff decision holds, as appellant contends it does, that the right to walk upon one's land with a seine guarantees the right as well to fill the seine with fish from the water in front thereof, without license to fish, not to mention a right to exclude every structure in the body of the river that is legally licensed, then we submit that the Court was entirely wrong and disregarded the law as plainly stated by itself. Counsel's interpretation of this decision cannot possibly be correct, unless the Oregon Supreme Court is to be left open to the criticism of stultifying itself and openly so proclaiming.

The logical result of such a decision would be to hold any duly licensed set-net unlawful if erected in front of any shore; judicial legislation nullifying all the statute laws in Oregon authorizing set-nets, and making the State the party to a fraud when it accepts money for a license to do what it cannot permit to be done.

The State has already assumed, correctly, that a shore-owner has no private right to enjoin a set-net, for by legislation, it attempted specifically to

grant that right in the Rogue, Willamette, Umpqua, and other designated rivers, not including the Columbia (Sections 4072 and 4073 of B. & C. Code, passed in 1899 and 1901, and declared unconstitutional in *Hume vs. Rogue River Packing Company,* 51 Or. 237). Why was this necessary, if the right existed at common law? The statutes authorizing and regulating set-nets were all passed subsequent to the above attempted inhibition (and before this cause of action arose), as follows: B. & C. Code, Section 4076 (1905), Sec. 4090 (1901), Sec. 4098 (1905), Sec. 4093 (1905) and Sec. 4115 (1905); L. O. L., Sec. 5259 (1903).

The fact that the legislature limited its proposed grant to these rivers shows quite conclusively that it did not intend to make the right general. The State has full power to create trap and set-net fisheries, even to the exclusion, perchance, of drag-seine fisheries. Not the common-law of riparian ownership, but the sovereign state as proprietor, through its legislative enactments, determines the nature of any fishery right in the waters which it owns. All fishery rights are mere franchises, not property (with the single exception of where the entire bed, as in a fish-pond, is privately owned); and the State has plenary power to say what those franchises shall be, and how they may be exercised.

It has said that the franchises may be for fixed appliances such as set-nets, to the possible exclusion of drag-seines, if such franchise be, as in the case at bar, prior in point of time. Were this not so,

how could a set-net be possible, a fixed appliance by nature, as the name implies? Both states by their licenses gave this franchise to appellees to erect and operate for the entire season, this fishery that couldn't exist without being fixed. Subsequently, appellant obtained a Washington license only to drag-seine in front of its shore, which it could have done without question were the way clear, and the site in Washington. But shore-ownership and junior franchise combined (not to mention shore-ownership alone, if as appellant insists, the Oregon laws govern) cannot enable it to make the way clear, when the State has seen fit to ordain something else. Appellant always has the privilege of drag-seining if it can do it. So has a shore-owner on the rock-jagged coast of Cape Flattery the privilege of drag-seining. But the State is no more concerned about the legally erected obstruction here than it would be there with the natural obstruction of sharp rocks. So far as the State's franchise could make it, appellees' set-nets changed the physical contour of the river-bed, and appellant could not exercise its license to drag-seine for the same reason it couldn't if large boulders instead stood in the way. Nor should appellees be any more liable for this limitation than the State for a natural barrier: a license to drag-seine, nor yet a riparian right to walk on one's shore, carries with it no right to demand either that the State blast out the rocks or that it remove a set-net located under its prior valid franchise.

As stated, then, the point for this Court to decide

is whether appellees could, properly licensed, erect any set-net whatever on this site; and not, as in the Eagle Cliff suit, whether the set-nets were properly constructed. The method of construction is not in issue here; but instead the right itself.

OTHER CASES CITED BY APPELLANT IN SUPPORT OF ITS RIPARIAN RIGHTS THEORY.

Appellant cites *Hume vs. Rogue River Packing Company,* 51 Or. 240 (92 Pac. 1065) as supporting its riparian theory. We refer this Court to the opinion itself and assert that on the contrary the decision was that a riparian owner has no right by common law, by statute, or by prescription to an exclusive fishery in front of his shore lands; and that such shore ownership was no basis in law for enjoining a set-net. The suit was by a riparian owner, claiming as such the right to enjoin the defendant from trespassing upon the plaintiff's alleged fishery, by fishing in the waters in front of the plaintiff's shore-lands. The trial court, Judge Hamilton presiding, dismissed the complaint and the Supreme Court of Oregon affirmed the decision in an exhaustive and well reasoned opinion. The court further held that a statute of Oregon which had attempted to grant to shore owners the exclusive right of fishery in front of their lands upon the shores of the Rogue and other rivers, was invalid and unconstitutional.

Yet appellant's counsel at pp. 56 and 57 of his brief says of that case as follows:

> "In the case of *Hume vs. Rogue River Packing Co.,* 51 Or. 240, the lower court held that

> Mr. Hume, as a riparian owner, had the right to complain against and enjoin a set-net location exactly similar to the set-nets sought to be placed in front of plaintiff's premises here, placed in front of Mr. Hume's tide lands between ordinary water mark and the navigable channel and same were a private nuisance, as to Mr. Hume, and an injunction was issued."

Why does counsel make such a statement to this Honorable Court? We are at a loss to understand how counsel of eminent standing can make a statement so at variance with the fact. We shall not entertain the thought that he intended to mislead this Court, yet the statement unchallenged would certainly have that effect.

We desire to be charitable and find some reason if we can for such an extraordinary statement to a tribunal of this character. The only reason we can fathom is that counsel had in mind the case which he next cites, *Hume vs. Turner,* 42 Or. 202 (70 Pac. 611); yet of that case he simply said that it supports the doctrine of the Rogue River case, and then adds that: "The rule here contended for has become a part of the jurisprudence of Oregon." Examining the context of the brief at the pages above mentioned, it requires a far stretch of imagination to conclude that counsel made the mistake in his references which we suggest, but if he did not labor under a pure mistake, then he surely does not understand what *Hume vs. Rogue River Packing Company* decides. Assuming that counsel's statement

was intended to refer to *Hume vs. Turner,* which was decided five years before the Rogue River case, then we have to say of the Turner case that whatever may have been said in that case the later decision, *Hume vs. Rogue River Packing Company,* said of it as follows:

> "* * * Plaintiff also relies with a good deal of confidence upon what was said by this Court in the case of *Hume vs. Turner,* 42 Or. 202, 70 Pac. 611. What was said there amounts to no more than a recital of the facts and issues before the lower court, and the relief granted by that court, from which the conclusion was deduced that the plaintiff in that case, who is the plaintiff here, and who had appealed, had obtained by the decree all of the relief asked by him, and for that reason he was not aggrieved by the decree of the trial court. Hence he had no right of appeal, and this Court *sua sponte* dismissed the appeal. That is all that was decided or attempted to be decided there."
>
> *Hume vs. Rogue River Packing Co.,* 92 Pac., p. 1069.

Moreover, the injunction granted in the Turner case was based entirely upon the aforesaid Oregon statute, which was five years later held to be unconstitutional and void, in the Rogue River case.

Appellant's other citations hold:

40 L. R. A. Note, p. 605: Summary of riparian owner's right of access. Sets forth, on page 602, the Oregon and Washington rulings that a riparian

owner has no peculiar rights in the water as an incident to his estate.

1 Farnham on Waters, p. 290, *et seq*:

> "Whether an obstruction in the river amounts to an interference with the riparian owner's right of access is a question of fact to be determined by the circumstances of each case (p. 295)."

In accord with the Eagle Cliff decision, *supra.*

Lewis on Eminent Domain, Sec. 641:

Treats the right of access as extending to the water.

San Francisco Svgs. Union vs. R. G. R. Pet. etc., (Cal.) 77 Pac. 823:

Enjoins as trespass a structure erected between high and low water mark, interfering with access to the water's edge.

Yates vs. Milwaukee, 10 Wall. 497:

Right of access to wharf.

Angell on Water Courses, Sec. 67:

States that a riparian owner has exclusive right to draw seines upon his own land. The preceding section, 66, points out that anyone may take the fish in tide waters, unless the right has been granted to another by legislative enactment, "so that he does not trespass upon the land of others." In the case at bar, it is not hinted that appellees touched appellant's land; nor has appellees' set-net right been granted to others by legislation.

Case vs. Toftus, 39 Fed. 730-734:

Concedes right of access to shore-owner "subject to the power of the legislature to regulate such use or privilege." The legislatures of Oregon and Washington have regulated any degree of access a shore-owner may have beyond the water's edge by the granting of franchises for set-nets and traps which may or may not tend to limit that access; which legislative power *Case vs. Toftus* expressly concedes.

Paine Lbr. Co. vs. U. S., 55 Fed. 854:

A riparian owner may build a wharf, "subject, however, to such restrictions as may, by law, be imposed (p. 866)." Nowhere in the record of the case at bar does it appear that appellees' set-nets would have interfered with a wharf had appellant built one, but the *contra* is shown.

Shepherd vs. Couer d'Alene Lbr. Co. (Idaho) 101 Pac. 591:

Plaintiff's ingress and egress were entirely obstructed by a log boom, which was enjoined. Appellant here has never contended that it was completely shut off from ingress and egress, as was Shepherd by the log boom, or as the Court held the Eagle Cliff Company to be by the long parallel cable.

Parker vs. Taylor, 7 Or. 448:

Shore owner may construct a wharf.

Shirley vs. Bishop, (Cal.) 8 Pac. 82:

A wharf three feet from shore and parallel to it for a distance of sixty feet was enjoined as an unreasonable interference with the upland owner's right of access to the water.

1 Farnham on Waters, sec. 66:

Not a word about the right to draw seines. This section simply discusses the right of access in general, as outlined in our argument, *supra,* and summarizes with this statement (p. 302):

> "* * * The right is confined to access to the front of the property, and does not include a right of access to the sides of piers which may be projected into the stream";

citing cases, one of which, *Vander Brooks vs. Currier,* 2 Mich. U. P. 21, held that a wharf owner cannot enjoin another wharf from being extended farther into the stream, although the effect is to make the access to his own wharf more difficult. Yet appellant's contention is that such plaintiff could have enjoined everything whatever, in order to maintain a clear space of water, had he wished to keep it so in order, for example, to tow a very broad boom of logs to his wharf. The principle is the same.

2 Farnham on Waters, sec. 872:

Not a word on the point contended for. Section 872 treats of the building of structures in a fresh water stream the title to the bed of which is in the riparian owner; holding that even then his right:

> "* * * to prevent others from building there, may be modified, not only by contracts which he has entered into, but also by the policy of the state as represented by legislative grants."

In other words, even if appellant owned the bed of the Columbia River its right to prevent appellees from building their structures would be subject to

the policy of the State, which has been to grant franchises for set-nets here and elsewhere.

Parker vs. Rogers, 8 Or. 183:

Right to construct a wharf granted by Oregon statute to shore-owner. Court holds this a franchise, not a property right, hence does not pass with title to tide lands across which wharf runs when said right has been reserved by shore-owner.

Wilson vs. Welch, 12 Or. 353 (7 Pac. 341):

Nothing about riparian rights. Sets aside a sale of tide lands to third party because statutory 60 days' notice had not been given shore-owner by the State.

De Force vs. Welch, 10 Or. 508:

Nothing about riparian rights. Held that defendant came within provisions of the act of 1874, giving upland owner prior right to purchase tide lands.

Shively vs. Parker, 9 Or. 505-6:

An issue of fraud. The reference on pp. 505-6 is mere dictum, stating that the Court presumes W "succeeded to whatever riparian rights were appurtenant to his interest in the claim."

Bowlby vs. Shively, 22 Or. 410 (30 Pac. 154):

Defendant, as upland owner, contended that he had riparian rights over tide lands sold by the State to plaintiff. Held that he had not; and that since defendant's predecessors had failed to build a wharf across tide lands prior to 1874 (when legislature vested a franchise in upland owners for their wharves then standing), wharfage rights, which are appurtenant to the tide lands themselves, did not

exist as a franchise for defendant. This case was afterwards before the Supreme Court of the United States, *Shively vs. Bowlby,* 152 U. S. 1, and an exhaustive opinion of that court which has made the case famous, affirmed the Oregon Supreme Court, and declared the law as we here state it.

Parker vs. West Coast Packing Co., 17 Or. 510 (21 Pac. 822):

Upland owner in deed of tide lands reserved right to build wharves and sought to eject tide-land owner, for having himself built one. Held ejectment not to be the proper form of action.

In view of the foregoing authorities, as above analyzed, cited by appellant to uphold its remarkable contention, it would seem to be unnecessary to cite more on appellees' account. Without exception, they support our argument on riparian rights, and without exception fail to establish any right in a shore owner by virtue of his riparian ownership, to keep an entire water course free and clear of all obstructions, despite the policy of the water's owner, the State.

This is a most unusual situation, where appellant has itself cited all the law necessary to disprove its own contention and sustain that of appellees.

Further as to Shore-Owner's Relation to Fishing Rights Established by State.

We trust we may be excused for further discussion of the law. From the very nature of a public fishery, every one, primarily, has an equal right

in it; and yet to be available to any one, he must, for a time, have exclusive rights of occupation and user, and this is exactly what the legislatures of both states bordering on the Columbia River, have attempted to give their respective licensees. Both states recognize set-nets as proper and appropriate fixed fishing appliances for the catching of salmon, and both states exact license fees and issue annual licenses therefor, which licenses the Supreme Court of the State of Washington, in *Walker vs. Stone,* 17 Wash. 578, has denominated as "franchises," and declared that their violation is an injury and properly cognizable in equity.

See also:

Halleck vs. Davis, 22 Wash. 393.
Legoe vs. Chicago Fish. Co., 24 Wash. 175.
White Crest Can. Co. vs. Sims, 30 Wash. 374

The following Washington cases have held that no fishing right can be initiated by trespass against the prior locator:

Elwood vs. Dickinson, 26 Wash. 631.
White Crest Can. Co. vs. Sims, supra.
Womer vs. O'Brien, 37 Wash. 9.

In the following two cases, the distances between conflicting locations of fish traps on the Columbia River were adjusted in favor of the prior locator:

Giles vs. Baseel, 38 Wash. 212.
Johansen vs. Mulligan, 41 Wash. 379.

The title to the bed of all navigable rivers being in the State, the title to fish before they are cap-

tured is in the State, in its sovereign capacity, in trust for all its citizens.

Portland Fish Co. vs. Benson, 56 Or. 147 (108 Pac. 122).

The sovereignty having jurisdiction over navigable waters may, under its police power, regulate or restrict the right of fishing therein.

State vs. Nielsen, 51 Or. 588 (95 Pac. 720).

The State being invested with title to the fish they cannot lawfully be captured without the State's express or implied permission, and hence a statute making it unlawful to engage in the business of canning salmon without obtaining a license, is a valid exercise of legislative power.

State vs. Hume, 52 Or. 1 (95 Pac. 808).

It has already been shown that appellees were properly licensed by the State of Washington to fish with set-nets in the Columbia River, and that said licenses had actually been attached to the locations selected by them for a period of more than ten days prior to the issuance of the State licenses to appellant. One of the appellees, McGowan, also had licenses from Oregon. Inasmuch as he was and is a citizen of the State of Washington, we call attention to the Oregon statute authorizing the issuance of fishing licenses to residents and citizens of Washington, to-wit: Sec. 4092 of B. & C. Code (Ore.).

Each State has a comprehensive license system. Drag-seines, like set-nets, are licensed, and the stat-

utes prescribe the manner in which the licensees may locate their licenses on the ground, in other words, pre-empt their fishing sites.

2 Rem. & Bal. Code (Wash.), Sec. 5214.
B. & C. Code (Ore.), Sec. 4098.

Appellant recognized the authority of the State of Washington to issue fishing licenses for the premises in controversy, and took out its roving licenses on June 30th, 1908. Before that time, the grounds had been located by the appellees under their State licenses, and appellant's licenses could not be spread over the same territory. Appellant came as a trespasser, and, under the Washington authorities, *supra,* took nothing, not even the initiation of a claim that could ever ripen into a right.

Notwithstanding the foregoing established system in both states, specially authorizing fixed fishing appliances, appellant has, at all times, insisted and still insists that its riparian ownership, as such, gives it the right to enjoin the operation of a fixed fishing appliance in front of its shore lands, on the claim that such operation prevents it from approaching its own shore lands in the manner it wishes to do. Appellant may protest as much as it chooses, but such claim is necessarily based upon the theory that its shore land ownership gives it rights out, in and over the water that are superior to the licensed appliances for fishing established by authority of the State. Such a contention is, in plain contravention of the settled policy of both States, in the exercise of their sovereign powers concerning the regulation

of fisheries, and will not be entertained by the Federal Courts to the advantage of a shore-owner, and against the rights of the States' licensees. That a shore-owner's rights in and over the water must be exercised subject to the rights of others, as authorized by the sovereign State, which has control over the waters and the fisheries, we refer to the following:

Ferry etc. vs. White River Assn., (Fla.) 48 So. 643.
2 Farnham on Waters, Sec. 375.
Shively vs. Bowlby, supra.
Hardin vs. Jordan, 140 U. S. 371.
Mann vs. Tacoma Land Co., 153 U. S. 273.
Dunham vs. Lamphere, 3 Gray (Mass.) 268.
Manchester vs. Mass., 139 U. S. 262.
McCready vs. Virginia, 94 U. S. 391.
Smith vs. Maryland, 18 How. 71.

In the recent case of *Barron vs. Alexander,* 206 Fed. Rep. 272, decided by this Court July 7th, 1913, a shore-owner sought to enjoin the construction of a fish trap in the waters in front of his property. It was held that he had no such right, and the injunction was denied. This was in the waters of Chatham Strait, Alaska, and the principle involved, we believe, is in all respects the same as the one involved here.

The plaintiff in that case alleged that he was the president and largely interested in a certain named corporation owning and operating a large salmon cannery at Funter Bay, Alaska, about four miles from the site in question, and that it had at all times

been the intention of the plaintiff to use the upland tract referred to,

> "* * * and the right of way out to deep water the entire width of said land as a fishing site and station, all of which is necessary to have and hold in order for plaintiff to successfully carry on the cannery business in which he is engaged."

In short, the plaintiff sought to prevent the fixed fishing appliance in front of his upland because he wished to preserve the whole water frontage for approaching his shore in any manner he chose to do, as appellant seeks to do here. The Court emphatically said he had no such right. Such late expression of this Court should, we believe, be decisive here in favor of appellees.

To the same effect is *Columbia Canning Co. vs. Hampton,* 161 Fed. 60, also decided by this Court.

DAMAGES.

In the argument of appellant's counsel upon this subject he severely arraigns both the special Master and the Trial Court. He seems to be gifted with much skill in the use of hyperbole, such as would do justice to a melodramatic story, but the propriety of its use in a legal argument may be open to dispute. It may appeal to some as having the appearance of force and vigor, but it will hardly be said that it supports the character of elegance and dignity common to serious legal arguments. Some idea of these laconic contributions to the literature of this case

may be gathered from the following quotations from appellant's brief:

"not supported by a scintilla of competent evidence";

"not a single witness testified," etc;

"is no finding of any fact in issue";

"absolutely no standard upon which any one could base an opinion";

"no human being had ever caught any fish by any such process there";

"the entire recklessness of this finding";

"the total disregard of the lower Court of appellant's rights";

"nothing could be more erroneous and absurd than findings No. IV. and V.";

"is nothing more nor less than judicial robbery."

The foregoing have the appearance of indicative catch words as flashed upon the screen of a picture show, and counsel apparently intended them as such here by way of illustrating his theory of the story he was writing for this Court. We are, however, unable to see how they may be complacently received by the sincere and painstaking trial court who tried this case, or by this Court in its regard for the proprieties and courtesies due to those upon the bench who labor so hard to reach just results.

Rule for Measuring Damages.

Appellant argues that appellees abandoned their original theory as to the measurement of damages

and also that the special Master and Judge Cushman overruled Judge Donworth as to the proper method for computing the damages. It will be remembered that by reason of appellant's injunction the appellees were deprived of the use of their fishing locations during four fishing seasons, that is to say during the years 1908, 1909, 1910 and 1911. After the action was commenced and the injunction issued, the four fishing seasons passed, before the judgment was entered by Judge Donworth which dissolved appellant's injunction. During all that time the appellant was occupying the ground and fishing with its drag-seines. Preliminary to the entry of the decree which dissolved the injunction, Judge Donworth filed an opinion, in which he stated that the cause would be referred to a special Master to take further testimony upon the subject of damages to appellees by reason of their having been deprived of the locations for the four fishing seasons; and in the opinion (Tr., p. 172) Judge Donworth said the following:

> "I do not consider that it would be a proper measure of damages to try to estimate how many fish defendants would have caught in the set-nets and how much profit they would have made from them. Such a method is entirely too conjectural. Defendants are entitled, however, to the reasonable net rental value of the set-net location out of which they had been kept by reason of the restraining order. While the probable catch of fish by means of the set-nets

would be one of the circumstances affecting the net rental value, it would not, in itself, be the measure of damages."

It will be seen that Judge Donworth declared the rental value of the locations to be the basis for determining the damages. While he said in his opinion that he would not consider an estimate of how many fish appellees would have caught in the set-nets, and the profit thereon, as a proper measure of damages, yet he did further say that the probable catch of fish by means of the set-nets would be "one of the circumstances affecting the rental value," although that would not be sufficient in itself. At that time nothing had appeared in the evidence to show Judge Donworth what had long been the established method of fixing the rental value of fishing locations on the Columbia River, and he had in mind only certain rules with respect to measuring rental value of property generally. He was not then informed, as the testimony afterwards taken clearly showed, that but one method exists for measuring the rental value of fishing locations upon the Columbia River, which method is based alone upon the annual catch of fish at a given location.

Appellees introduced testimony to show the method of fixing the rental value of fishing locations upon the Columbia River, and appellant did not controvert this testimony by attempting to show any other or different rule. The testimony showed the rule to be that the rental value of a location to the lessor, for the fishing season, is equal to one-

third of the gross catch of fish at the location for the season, and that the lessee is entitled to two-thirds of the gross catch if he furnishes the fishing gear. If, however, the lessor furnishes both the location and the gear, he is entitled to one-half of the gross catch. The foregoing was shown to be the long-prevailing and only rule, by witnesses who have for many years been engaged in the fishing business on the Columbia River.

See testimony of

Amon Markham, Tr. pp. 469-471.
Ralph Grable, Tr. pp. 496-497.
H. S. McGowan, Tr. pp. 557-559.
Erick Lindstrom, Tr. p. 600.

The rule, we believe, must be regarded as an established fact, as it was not seriously controverted and no other was shown. Bearing this rule in mind, the appellees are in the position of forced lessors, since they were deprived of the use of their locations, and the measure of their damages is the rental value. As Judge Donworth indicated in his opinion, we are required to resort to the circumstance of an estimate of the number of fish that might have been caught in the set-nets for the years involved, and the evidence shows it to be a necessary circumstance to determine the rental value. There was therefore no real departure from the rule announced by Judge Donworth, and any seeming modification of it was such as he, himself, would have been impelled to follow, had he remained upon the bench and heard the

subsequent testimony before the trial was concluded upon the question of damages.

The testimony being as hereinbefore set out, without even any conflict, the rule is therefore established as fully as any fact in this case. The inherent peculiar nature of a fishing location is such as takes it out of any ordinary class of rentable property, and the reason for the usage as to fixing rental value of such locations is manifest. The existence of the rule being a fact, there was no other way to prove the rental value, which Judge Donworth had declared to be the proper measure of damages.

We wish to call attention to the following authorities which have to do with measuring damages in similar situations to the one at bar. While the damages were not in terms referred to as being equal to the rental value, as Judge Donworth seems to put it, yet the class of evidence considered and the conclusions from the methods of computation there used, lead to the same result, and, in the end, it amounts to the rental value, although referred to as probable profits of the business. This is true for the reason that, as we have seen under the testimony in this case, the rental value, under the custom of the Columbia River, is always measured by the results of the business of the fishing season.

The case of *Pacific Steam Whaling Co. vs. Alaska Packers Association* (Cal.), 72 Pac. pp. 161-165, is directly in point as to what damages should be recovered in a similar situation, where one has been

deprived of the use of a fishing location. We quote from the opinion, beginning on page 163, as follows:

> "Upon the subject of actual damages there was no error in admitting evidence or instructing the jury. Plaintiff claimed that it had been forcibly excluded by defendant from salmon fishing in the said waters during the fishing season of 1897. The court had instructed the jury on that point as follows: 'I instruct you that sufficient reason would exist for plaintiff to desist from further attempt to fish if the acts and declarations of defendant's agent were such as would satisfy a reasonable man that further attempts to fish would be useless, because they would be met and frustrated by force'; and there was evidence to warrant the jury in finding the fact referred to in the instruction. The general nature of the evidence as to actual damages to which defendant objected, and which plaintiff was allowed to introduce, was this: Evidence tending to show how many fish plaintiff could, with reasonable probability, have taken from the fishing grounds in question if it had not been excluded therefrom by the unlawful acts of defendant, the value of such fish, and the profits which would reasonably have accrued to the plaintiff from the fish when canned. Plaintiff was also, in this connection, allowed to introduce evidence tending to show how many fish defendant actually did take in these fish-

eries during the said season. The court also instructed the jury as follows: 'I instruct you that if you find that defendant or its employes or servants were, under the law as given you, guilty of the acts constituting an unlawful interference with plaintiff's pursuit of a lawful business in a lawful way, then you must assess as damages the amount which will compensate plaintiff for all the detriment proximately caused thereby. I instruct you that if you find that plaintiff suffered damage by reason of the alleged wrongful acts of the defendant, or of its servants and employes, then, in assessing the amount of damages caused to plaintiff by the alleged wrongful acts, you may consider the loss, if any, to plaintiff of probable profits in its business.' The position of defendant is that the evidence pointed to damages too much in the nature of mere speculative profits to be admissible at all. We do not think that in these rulings of the court as to evidence, or in giving the said instructions, there was any error. The profits sought to be proved were not so remote, uncertain, prospective, or conjectural as to be entirely beyond the range of legitimate damages. Of course, evidence of such damages should be closely scrutinized by a jury, and claims merely fanciful and beyond reasonably proximate certainty should be by them excluded; but the jury in this case were suitably instructed and warned

on that subject, and it is to be presumed that they did their duty in the premises. With respect to this kind of damage, of course, there cannot be the absolute certainty possible in many plainer cases; but a wrongdoer cannot entirely escape the consequences of his unlawful acts merely on account of the difficulty of proving damages. He can do so only where there is no possibility of a reasonably proximate estimation of such damages, which is not the fact in the case at bar. The waters in question here constituted a special salmon fishery, where those fish were to be found in great abundance, and the proposition that damages evidently suffered by plaintiff from the wrongful act of the defendant by which plaintiff was excluded from exercising the clearly valuable right of fishing in those waters are entirely beyond legal proof, cannot be maintained. We think that on this point the case at bar is within the rule announced in *Shoemaker vs. Acker,* 116 Cal. 239, 48 Pac. 62, and cases there cited."

The above case is cited with approval in Sutherland on Damages, (3rd Ed.) volume 1, p. 223, where it is said:

"A person who has been forcibly prevented from fishing in public waters may show the quantity of fish he might have caught, the value of the same, and the probable profits he would have made. As an aid in determining

these questions, he may prove the quantity of fish caught in the waters from which he was excluded by the defendant."

The rule, as thus stated, is not a recent one. In the case of *Post vs. Munn* (New Jersey, 1818), 7 American Decisions, 570, the plaintiff sought to recover damages for injury to his fishing net by a vessel. The court said, in part (p. 574):

> "As little solidity does there seem in the objection to the proof about the run of the shad, and the usual profits of the net. For what is the suit brought? Not alone for the mere tearing of the net; that is but a small portion of the damage sustained. The greatest part of the injury arises from losing the use of the net, and the value of that use depends upon the run of the shad. There is no other mode in which the plaintiff could show what really were the damages sustained by him."

There are many analagous cases, and although but few of them involve the question of fisheries, the principles are the same. In the case of *Allison vs. Chandler,* 11 Mich. 542, the plaintiff asked damages for injuries by which his house was made untenable. The court said (pp. 555-6):

> "The evidence strongly tended to show an ouster of the plaintiff for the balance of the term, by the defendant's act. This term was the property of the plaintiff; and, as proprietor, he was entitled to all the benefits he could derive from it. He could not by law be com-

pelled to sell it for such sum as it might be worth to others; and, when tortiously taken from him against his will, he can not justly be limited to such sum—or the difference between the rent he was paying and the fair rental value of the premises—if the premises were of much greater and peculiar value to him, on account of the business he had established in the store, and the resort of customers to that particular place, or the good will of the place, in his trade or business. His right to the full enjoyment of the use of the premises, in any manner not forbidden by the lease, was as clear as that to sell or dispose of it, and was as much his property as the term itself, and entitled to the same protection from the laws. He had used the premises as a jewelry store, and place of business for the repairing of watches, making gold pens, etc. This business must be broken up by the ouster, unless the plaintiff could obtain another fit place for it; and if the only place he could obtain was less fitted and less valuable to him for that purpose, then such business would be injured to the extent of this difference; and this would be the natural, direct and immediate consequence of the injury. To confine the plaintiff to the difference between the rent paid and the fair rental value of the premises to others, for the balance of the term, would be but a mockery of justice. * * * The rule which would confine the plaintiff to

> the difference between such rental value and the stipulated rent can rest only upon the assumption that the plaintiff might (as in the case of personal property) go at once into the market and obtain another building equally well fitted for his business, and that for the same rent; and to justify such a rule of damages this assumption must be taken as a conclusive presumption of law."

In *Edwards vs. Edwards,* 31 Ill. 474, an injunction was issued early in the spring and was dissolved in September, and during that time, restrained the party from taking possession of a farm. It was insisted that the measure of damages should be the value of the use of the land up to the time when the injunction was dissolved. The court, however, allowed the evidence to take a wider range and show that being kept out of the land until the first of September occasioned the loss of the crops for the season. The question was not what the land was worth to the complainant in the injunction suit, but what was the damage to the defendant for being kept out of possession during that period.

In view of the above authorities, taken in connection with what is said in Judge Donworth's opinion in this case, and also in view of the evidence as to the method of fixing the rental value of Columbia River fishing locations, together with the evidence as to the annual output of fish at the Sand Island locations, we submit that the only

proper rule for measuring the damages was followed by the Court.

As to Proving Rental Rule.

Counsel for appellant merely suggests that the rule must be pleaded before it can be proved. No such objection was made to the testimony at the trial and it should not now be considered on appeal. Moreover, this is an equity suit, first instituted by the appellant itself, and all the damage arose directly from appellant's act in bringing the action and invoking the strong arm of the Court to dispossess appellees from their locations. Equity having taken hold of this controversy will settle it for all purposes, including the damages.

16 Cyc. pp. 106 and 107 and cases there cited.

It was the duty of the Court to ascertain the true amount of the damages without reference to any technical rules of pleading. The testimony having been offered and received without any objection on the ground that it involved a rule or custom not pleaded, the Court should under all modern liberal rules as to amendments and especially in an equity cause deem the pleadings to be amended to conform to the proof, especially so when the point was not raised below in a manner to give opportunity for amendment.

> "One class of amendments is freely permitted without much regard to the time when the application is made, * * *. Amendments are therefore permitted where the evi-

dence has made out a case for relief, but differing in some of its phases, sometimes materially, from the case made by the bill, and also where there is a similar variance between the bill and the findings of a master or committee; * * * . In most of the cases cited the amendment was asked and allowed on the hearing, but it may be made after the hearing, after verdict on issues submitted to the jury, or sometimes even on appeal."

16 Cyc. 346 and 347 and cases there cited.

The testimony of the witnesses upon this subject was strictly in accordance with well-settled legal rules. The witnesses did not testify as to their opinion upon the subject, but as to the fact that such a usage existed.

12 Cyc. 1099, and cases there cited.

29 Am. & Eng. Enc. of Law 410 *et seq.,* and cases there cited.

Extent of the Damages.

The rule for measuring the damages being established it was next the Court's duty to ascertain the extent thereof. Appellees being in the position of forced lessors were entitled to recover one-third of the value of the catch, which their set nets would have caught during the four seasons they were deprived of their locations. There was no way to ascertain the amount by an actual catch of the set nets during that time, as appellees were prohibited from operating them. The only way to ascertain it

was by comparison with the actual catch of appellant's drag seines at the same location, and during the same years.

The appellees introduced as witnesses experienced fishermen who have long fished upon the Columbia River, and who are familiar with the location in question. These men were experienced in the operation of the various fishing devices, including set nets.

It was frequently testified that the location in question is the best fishing ground on the Columbia River and no witness testified to the contrary effect. It will be remembered that during the four fishing seasons involved the appellant fished the location with drag seines and the exact amount of the catch made by the drag seines was stated by the testimony of R. A. Hawkins, appellant's superintendent, as hereinafter shown.

The witnesses above mentioned concurred in the opinion that the set nets which appellees would have operated on that ground, if they had not been prevented by appellant's injunction, would have caught two-thirds as many fish as were caught by the drag seines.

See testimony of
Amon Markham, Tr. p. 466.
Ralph Grable, Tr. p. 502.
H. S. McGowan, Tr. pp. 557-559.

R. A. Hawkins, appellant's superintendent, testified that the drag seines actually caught the following amounts for the several years:

1908	150 tons
1909	104 tons
1910	135 tons
1911	390 tons
Total for the four years	779 tons

See Tr. pp. 699 and 700, also p. 221 concerning the first three years.

The total catch of the drag seines having been 779 tons, two-thirds of that amount, or 518 tons, would have been the catch of appellees' set nets. Under the rule already stated as to rental value appellees were entitled to one-third of 518 tons, or 172 tons, as the rental value of their locations, the measure of their damages.

There was much testimony as to the price of fish, but H. S. McGowan testified, Tr. p. 565, that the average selling price for those years was $130.00 per ton; 172 tons at $130.00 per ton amounts to $22,360.00, which was the amount of damages found by the Special Master. The Court on the hearing upon the Special Master's report reduced the amount to $22,083.00 and judgment in the aggregate was entered for the latter amount in the final decree. Tr. pp. 199-202. The amount of the judgment is fully sustained by the evidence and represents the true amount appellees are entitled to recover. Appellant's counsel characterizes the judgment as "judicial robbery," but he should remember that appellees have rights which are protected by law as well as his own client, and it ill becomes him to so speak of the solemn judgment of a careful

Court who seriously endeavored to find the facts as they were shown by the testimony and to render judgment for the correct amount. Appellees' testimony tended to show that the drag seines should have caught a substantially greater amount than Mr. Hawkins' figures showed, but as his testimony was definite and positive as to the actual amount caught, the Special Master adopted his figures and the Court confirmed them.

H. S. McGowan testified, Tr. p. 567, that the three appellees are equally interested in the recoverable damages and the judgment was accordingly so entered, awarding to each appellee judgment for one-third of the total damages found, and for one-third of the taxable costs expended, limiting the total judgment against the Surety Company, the surety upon the injunction bond, to $12,000. The amount of the liability upon the bond in favor of each appellee, $4,000, was included as against the surety, The United States Fidelity and Guaranty Company. Tr. pp. 201-2.

As to Appellant's So-Called "Forced Injunction."

Appellant makes the unique argument that appellees are not entitled to recover damages for any period of time after appellant's motion to dismiss was filed. The argument is that if appellees had not resisted the motion, the action would have been dismissed and the injunction thereby dissolved. It will be remembered that the motion to dismiss was made upon the sole and only ground that the Court

had not jurisdiction. Meantime, appellees had interposed their cross-complaints for damages, which they had a perfect right to maintain without having to go into another forum, if the Court had jurisdiction over the parties. The trial Court as we have seen held that it had jurisdiction and proceeded with the action. If the appellant had desired to be relieved of future liability for its injunction, it was a simple matter to ask the Court to dissolve it, to which no objection could have been made, even if the action did proceed for the determination of damages for past time. Thereafter appellees could have resumed their locations and caught the very fish which were caught by appellant in the subsequent years, in which event they would have had no cause for damages in those years. Appellant, however, at all times, kept its injunction alive when it could easily have procured its dissolution, choosing to do so in order that it might by protection of the injunction occupy the fishing grounds and exclude appellees therefrom. Appellant says that it filed its motion early in June, 1909, which was about the beginning of the fishing season of that year. If it had then asked the Court to dissolve the injunction regardless of the question of jurisdiction, it might have been relieved from liability for the years 1909, 1910, and 1911. Appellant, however, used the strong power of the injunction to maintain its occupancy for those years, and as the record shows, it caught during those three seasons 629 tons of fish at those locations, of the value of

$81,770.00. It is certainly a novel contention that under these circumstances it can now walk away with more than $80,000.00 worth of appellees' fish, and say it is not liable for damages because it tried to dismiss its action. Dismissal of the action with the cross-complaints in existence was one thing, and dissolution of an injunction in the same case was quite another thing. Appellant sought to go out of the trial court on damages and everything else, but when it found it could not do that, it at all times insisted upon maintaining its injunction, and must now accept the consequences. This case has developed peculiar phases, but none more peculiar than appellant's argument on this point. The motion to dismiss was not even denied by the Court until September, 1909, and even under appellant's own remarkable theory, appellees had already lost the seasons of 1908 and 1909. We can see no reason for extending remarks upon this point, since the above analysis of appellant's argument shows that it must fall by its own weight.

CONCLUSION.

In conclusion, appellees urge that the following points are fully established in this case:

1.—That the trial court had complete jurisdiction over the parties to the suit by reason of diverse citizenship. The action in its nature being *in personam* was to obtain an injunction which could act only upon the persons. As shown by the complaint, the initiatory pleading, the amount involved is far

above the sum of $3,000.00 necessary to give the court jurisdiction on the ground of diverse citizenship. The action does not involve or affect real estate, and is in no sense local, but is purely transitory, inasmuch as it affects the acts and conduct of persons only.

2.—That appellant has not, by virtue of its riparian ownership as lessee of Sand Island, any rights below low water line which may not be enjoyed by other citizens of the State; that as such shore-owner, it has the right of access to the water's edge and the exclusive right to draw seines upon its own shore; that while it may so exclusively draw seines upon its own shore, yet that gives it no right to operate its seines in the waters in front, except subject to the fishing regulations established by the State; and no right as such shore-owner to enjoin licensed fishing appliances in the waters below its lands.

3.—That under the fishing regulations established by the State, fixed fishing appliances, such as set-nets and traps, are fully authorized in the waters in question, and appellees' set-nets having been properly located, and constructed there, appellant, as shore-owner, cannot interfere with their operation in order to serve its drag seine purposes.

4.—That appellant's injunction was improperly sought and issued in this cause for the reason that it, without the basis of any legal right, stopped the operation of appellees' set-nets, resulting in great damage to them.

5.—That the amount of damages ascertained and assessed by the Court is amply sustained and justified by the record in every particular.

Believing that the above points are fully established by the law and the facts, we respectfully submit that the judgment of the lower court should be affirmed.

WELSH & WELSH and
DORR & HADLEY,
Solicitors for Appellees.